TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 364

ALBERT SMITH, PETITIONER,

vs.

JOSEPH O'GRADY, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

PETITION FOR CERTIORARI FILED AUGUST 22, 1940.

CERTIORARI GRANTED OCTOBER 21, 1940.

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[fol. 5]

IN DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF NEBRASKA IN AND FOR LANCASTER COUNTY

Habeas Corpus. No. V-248

ALBERT SMITH, Petitioner,

vs.

JOSEPH O'GRADY, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska, Respondent

PETITION FOR A WRIT OF HABEAS CORPUS—Filed February 14, 1940

To the Honorable Court:

Comes now Albert Smith, the petitioner herein, who respectfully invokes the jurisdiction of this Honorable Court under color of authority of Article I, Section 9, Paragraph 2 of the Constitution of the United States, Article I, Section 8 of the Constitution of the State of Nebraska, and Chapters 27-317 and 29-2801 and subsequent chapters of the Compiled Statutes of Nebraska for 1929, all of which give the District Courts of Nebraska jurisdiction to issue writs of habeas corpus; and your petitioner respectfully shows to this Honorable Court that he is actually and unlawfully restrained of his liberty within the jurisdiction of this Court, being detained in the Nebraska State penitentiary at Lancaster, Lancaster County, Nebraska in [fol. 6] the custody of Joseph O'Grady, Warden, under color of authority of a process of the State of Nebraska by virtue of an unlawful commitment based upon a void and illegal judgment and sentence rendered by the District Court of the Eleventh Judicial District of Nebraska, in and for Valley County, said void and illegal judgment and sentence being rendered by the aforesaid trial court without jurisdiction of or over the defendant (the petitioner herein) or the subject-matter, and made under the following circumstances as hereinafter shown.

Statement of the Case

Your petitioner was arrested at Arapahoe, Furnas County, Nebraska, on or about September 19, 1932, and taken to Beaver City, Nebraska, where he was held in the Furnas County jail for about two hours. On the same date your petitioner was removed to the Buffalo County jail at Kearney, Nebraska, where he was held for two days without being informed of the cause of his arrest. On the third day after his arrest, on or about September 22, 1932, your petitioner was told he was wanted on a charge of burglary in Valley County, Nebraska, and that if he would agree to plead guilty to the charge (of burglary) he would be dealt with leniently. To this your petitioner agreed, on the condition that such an arrangement was first sanctioned by the County Attorney of Valley County. Accordingly, the Valley County Sheriff, Mr. George S. Round, arranged for your petitioner to talk by long distance telephone, from the office of the Buffalo County jail, with the County Attorney of Valley County, Nebraska, Mr. George A. Munn. In the presence of Valley County Sheriff Round and Mr. Otto Dudschus, then a Depity Sheriff of the State of Nebraska, your petitioner conversed, by long distance telephone, with a person identified by Sheriff Round as the County Attorney of Valley County, Mr. George A. Munn. At this time Mr. Munn agreed to a bargain in which it was understood that if your petitioner would plead guilty, the sentence [fol. 7] meted out to him by the Court would not exceed three (3) years imprisonment in the Nebraska State Penitentiary. Following this telephone conversation and agreement, your petitioner was transferred to the Hall County jail at Grand Island, Nebraska, by the aforesaid Mr. Otto Dudschus, where he was confined for about three more days. On the following Monday morning, on or about September 24, 1932, your petitioner was taken to the Valley County jail at Ord, Nebraska, and there confined pending trial. During the following two or three days your petitioner had many conversations with Sheriff Round, and on two different occasions he requested the Sheriff to get him a copy of the charge filed against him. In response, Sheriff Round told your petitioner that the charge had not yet been filed, but that it was not necessary for him to have a copy anyway, for everything had been "fixed." Finally, on or about September 27, 1932, at or about 1:30 in the afternoon, without ever having had a copy of the charge filed against

him served upon him, your petitioner was taken before the District Court of the Eleventh Judicial District of Nebraska in and for Valley County, whereupon he was summarily arraigned, and, upon his prearranged plea of guilty, sentenced, to his surprise and consternation, to a term of twenty (20) years imprisonment in the Nebraska State Penitentiary. Your petitioner had never before been in a court room for any purpose whatsoever, and his knowledge of law and legal procedure was therefore extremely limited. Notwithstanding this fact, your petitioner protested vigorously and asked both the Court and the County Attorney to show him a copy of the charge to which he had entered a plea of guilty. This request was refused. Your petitioner then requested permission of the Court to withdraw his plea of guilty and, at the same time, he requested that an attorney be appointed to assist and advise him, and that he be given a proper opportunity to defend himself. These requests were also refused by the Court and, within the hour, your petitioner was on his way to the penitentiary [fol. 8] in the custody of the sheriff of Valley County, Nebraska. Not until after your petitioner had been committed to the penitentiary did he discover that he had been duped and inveigled into entering a plea of guilty to a charge of burglary with explosives, and not until seven (7) years later, on October, 1939, did your petitioner actually see a copy of the charge, and then only after he had purchased it for the sum of one dollar and fifty cents ($1.50).

In the intervening years your petitioner has made every effort an uneducated layman could possibly make to have this unjust and illegal imprisonment terminated. Being without the necessary funds to hire counsel, and knowing nothing of appellate procedure, your petitioner was unable, because of these shortcomings, to carry an appeal to the Supreme Court of Nebraska. His appeals to the Board of Pardons of the State of Nebraska have likewise been futile. Finally, in desperation, your petitioner purchased a certified copy of the Information, Judgment, and Sentence, as the same appears of record in the office of the Clerk of the Valley County District Court and, upon the foundation laid by these records of the trial court, ("Exhibit A"), this petition was prepared, with the assistance of another inmate of the Nebraska State Penitentiary, all of which is permissible and in accordance with the habeas corpus statutes of the State of Nebraska.

A certified copy of the aforesaid information, Judgment, and Sentence, as the same appears of record in the office of the aforesaid Clerk of the Valley County District Court, is hereto attached (at pages 7 to 12 inclusive) and marked "Exhibit A" and made a part of this petition, and the same to be considered as if set out in full herewith

* * *

REASONS RELIED UPON FOR ISSUANCE OF WRIT

Your petitioner, Albert Smith, contends and alleges that he was deprived of a fair and impartial trial; that the judgment, as hereinbefore set out, "Exhibit A", is void [fol. 9] and a legal nullity; and that the commitment by which he is detained and restrained of his liberty by the respondent is therefore a legal nullity, in this, to-wit:

I

Your petitioner contends and alleges that he was deprived of his constitutional right to know the nature and cause of the accusation for which he was to answer, and that he was deprived of a copy thereof in writing, all of which is provided by Chapter 29-1802 of the Compiled Statutes of Nebraska for 1929, and by Article I Section 11 of the Constitution of the State of Nebraska, and by the Sixth Amendment to the Constitution of the United States.

II

Your petitioner contends and alleges that he was deprived of his constitutional right to have the assistance of competent legal counsel to aid and advise him, all of which is provided by Chapter 29-1803 of the Compiled Statutes of Nebraska for 1929, and by Article I Section 11 of the Constitution of the State of Nebraska, and by the Sixth Amendment to the Constitution of the United States.

III

Your petitioner further contends and alleges that he did not waive the fundamental constitutional rights of which he was deprived as shown in the first and second preceding allegations of this petition, namely, (1) to know the nature and cause of the accusation for which he was

to answer, or to receive a copy thereof in writing; and (2) to the assistance of competent legal counsel.

IV

Your petitioner further contends and alleges that the judgment as pronounced by the trial court, and as shown by your petitioner's "Exhibit A", is void and a legal nullity and was rendered contrary to and in violation of Chapters 29-2201 and 29-2202 of the Compiled Statutes of Nebraska for 1929, in that it does not show a conviction by a jury or a finding of guilt by the trial court.

[fol. 10]

V

Your petitioner further contends and alleges that, because of the above and foregoing, he was arbitrarily deprived of his constitutional right to due process of law as provided by Article I Section 3 of the Constitution of the State of Nebraska and the Fourteenth Amendment to the Constitution of the United States, in that the trial court did not have jurisdiction to arraign, or to accept a plea from, your petitioner, without first supplying him or seeing to it that he was supplied, with a copy in writing of the nature and cause of the accusation for which he was to answer; or without notifying him in open court, in language sufficiently common to be understood by the petitioner, of the nature and cause of the accusation for which he was to answer; nor did the trial court have jurisdiction to proceed to trial against your petitioner, after petitioner had requested the assistance of an attorney, without first appointing competent legal counsel to aid and advise him in his defence.

VI

Your petitioner further contends and alleges that the judgment and sentence as rendered against him by the aforesaid District Court of Nebraska in and for Valley County, as set out in the aforesaid "Exhibit A", are void and legal nullities and without force or effect upon your petitioner, in that the aforesaid trial court of Valley County did not have jurisdiction of or over the person of the defendant (the petitioner herein) or of the subject-matter at any stage of the proceedings.

VII

Therefore, your petitioner contends and alleges that the commitment by which he is detained and restrained of his liberty by the respondent is also void and a legal nullity, in that it was made under color of authority of an unlawful and illegal judgment and sentence rendered by the aforesaid trial court of Valley County in and [fol. 11] for the State of Nebraska, and under these circumstances habeas corpus is proper and will lie to release your petitioner from such unlawful and illegal restraint and imprisonment.

Wherefore, your petitioner, Albert Smith, having shown that he is being restrained and deprived of his liberty by the respondent in violation of the laws and Constitution of the State of Nebraska and the Constitution of the United States, respectfully prays that Joseph O'Grady, as warden of the Nebraska State Penitentiary, be made the respondent in this cause of action; that the ancient and honorable writ of habeas corpus issue to Respondent Joseph O'Grady, commanding him to present the petitioner, Albert Smith, instanter, before this Honorable District Court of the Third Judicial District of Nebraska in and for Lancaster County to answer by what right or authority he has, if any, to restrain and deprive your petitioner of his liberty; that all the matters complained of herein be examined by this Honorable Court; that the judgment, sentence, and commitment herein complained of be declared null and void, and that the petitioner, Albert Smith, be released therefrom without delay, as law and justice require.

And your petitioner will ever pray.

Albert Smith, Petitioner pro se., #11283, Nebraska State Penitentiary, Lincoln, Nebraska.

EXHIBIT "A" TO PETITION

Clerk's Certificate to information and judgment omitted in printing.

[fol. 12] Copy

IN THE DISTRICT COURT OF VALLEY COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff,

vs.

ALBERT SMITH, Defendant

JOURNAL ENTRY OF JUDGMENT

Now on this 27th day of September, 1932, the above entitled action came on for hearing upon the Information filed herein by the County Attorney in and for the County of Valley, State of Nebraska.

The Plaintiff, The State of Nebraska, being represented in open Court by George A. Munn, County Attorney, and the Defendant, Albert Smith, being present in person in Open Court. Trial had.

Defendant appearing in Court and waives preliminary examination and asks that he be arraigned at once.

Thereupon the Defendant was duly and legally arraigned and plead "Guilty" to the Information as charged.

It Is Therefore Considered and Adjudged that the Defendant, Albert Smith, be taken to the Nebraska Penitentiary at Lancaster, Nebraska, and there confined at hard labor, Sundays and Holidays excepted, for a period of Twenty Years and that he pay the costs of this action. Solitary Confinement forms no part of this Sentence.

By the Court, (S.) Edwin P. Clements, Judge of the District Court.

Doc. 13, Page 109, No. 3509.

INFORMATION

DISTRICT COURT

[fol. 13] VALLEY COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff,

vs.

ALBERT SMITH, Defendant

Information for Burglary With Explosives

Section 28-543

Filed September 27th, 1932

(S.) Alfred A. Wiegardt, Clerk of the District Court. By —— ——, Deputy. George A. Munn, County Attorney.

Witnesses: Otto Dudschus, Z. D. Fitch, Ray Carroll, William Flake, Frank Rennacker, Frank Pierce, Glenn Fox, Henry Frey, George S. Round, Roy F. Pardue, Leonard H. Covert, Ray Martin, Elvira Beeh.

Bail fixed in the sum of $——

——— ———, Judge.

Arraigned September 27th, 1932, and entered plea of Guilty.

(S.) Alfred A. Wiegardt, Clerk of the District Court.

Information—County Attorney

STATE OF NEBRASKA,
County of Valley, ss:

Copy

In the District Court of the Eleventh Judicial District of Nebraska, in and for Valley County.

[fol. 14] INFORMATION—Burglary with Explosives—Section 28-543

THE STATE OF NEBRASKA, Plaintiff

vs.

ALBERT SMITH, Defendant

Be It Remembered, That George A. Munn, County Attorney in and for Valley County, and in the Eleventh Judicial District of the State of Nebraska, who prosecutes in

the name and by authority of the State of Nebraska, comes here in person, into Court at this, the September 27 term, A. D. 1932, thereof, and for the State of Nebraska gives the Court to understand and be informed that Albert Smith late of the county aforesaid, did on the Fifteenth day of September, A. D. 1932, in the County of Valley and State of Nebraska aforesaid, then and there being, did then and there wilfully, unlawfully, feloniously, burglariously, maliciously and forcibly break and enter into the Chicago, Burlington & Quincy Railroad Company, a corporation, station house depot building in the City of Ord, Valley County, Nebraska, and did then and there wilfully, unlawfully, feloniously and maliciously by the use of explosive commonly called nitroglycerine or soup forcibly explode and break open a safe there situated with the intent and accomplished purpose then and there wilfully, unlawfully, feloniously, burglariously and maliciously to injure said safe, the property of the Railway Express Agency, Inc., a corporation, and to steal take and carry away from said building and safe the goods and chattels of the said Chicago, Burlington & Quincy Railroad Company, a corporation, and Railway Express Agency, Inc., a corporation, without the consent and against the will of the said Chicago, Burlington & Quincy Railroad Company, a corporation, and Railway Express Agency, Inc., a corporation, the respective owners thereof—Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Nebraska.

[fol. 15] (S.) George A. Munn, County Attorney.

State of Nebraska,
County of Valley; ss.:

I,—Sheriff in and for Valley County, Nebraska, do hereby certify that on the — day of ——, A. D. 19— in the county aforesaid, I served a true and certified copy of the within information on the herein Defendant —— by delivering to him personally a true and certified copy of said information with all endorsements thereon.

Dated at Ord, Nebraska, in said county, this — day of — A. D., 19—. —— —— Sheriff.

STATE OF NEBRASKA,
County of Valley, ss.:

George A. Munn, being first duly sworn, upon his oath says that he is the County Attorney in and for Valley County, in the Eleventh Judicial District of the State of Nebraska, and that the allegations and charges against the defendant Albert Smith in the within information are true as he verily believes.

George A. Munn, County Attorney.

Subscribed in my presence and sworn to before me this Twenty-seventh day of September, A. D. 1932.
Alfred A. Wiegardt, Clerk of the District Court.
(S.) Alfred A. Wiegardt. (Seal.)

STATE OF NEBRASKA,
County of Lancaster, ss.:

I, L. M. Larsen, a duly appointed and authorized Notary Public in and for Lancaster County, Nebraska, do hereby [fols. 16-58] certify that I have read and examined the above and foregoing pages, numbered seven (7) to twelve (12) inclusive and marked as "Exhibit A", and do find the same to be a true and correct copy of a certified copy of the Information, Judgment, and Sentence in the case as represented therein insofar as the contents, dates, certifications, and signatures appearing on this copy, marked as "Exhibit A" on the aforesaid pages seven (7) to twelve (12) inclusive, are concerned.

In Witness Whereof, I have hereunto set my hand and affixed my seal this 13 day of December, A. D. 1939.

L. M. Larsen, Notary Public in and for Lancaster County, Nebr. My commission expires November 19th, 1943. (Seal.)

Brief Argument in support of Petition for a Writ of Habeas Corpus omitted in printing.

[fol. 59] IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

MOTION FOR LEASE TO PROCEED IN FORMA PAUPERIS—Filed February 14, 1940

Comes now the movant, Albert Smith, who is the petitioner in the above entitled cause of action, and respectfully moves that this Honorable Court grant him leave to file and proceed to a conclusion with said petition for a writ of habeas corpus as an impecunious person.

The movant states that, because of his poverty he is unable to pay the Clerk's cost of filing fees in the foregoing cause of action in this Honorable Court and moves that such costs be allowed by this Court because of petitioner's poverty.

The movant further states that, because of his poverty [fol. 60] he is unable to secure the aid or assistance of competent legal counsel, and moves this Honorable Court to appoint an attorney to aid and assist the petitioner in his cause of action in order that he may better prosecute his petition and defend his constitutional rights; and the movant herein further moves this Honorable Court to allow counsel fees so incurred to be taxed as costs and audited as per the provisions of Chapter 29-1803 of the Compiled Statutes of Nebraska for 1929.

The movant herein has invoked his constitutional and statutory right to the assistance of counsel, as shown in the first preceding paragraph, on the grounds that habeas corpus is habeas corpus, no matter under what circumstances or under what conditions it may be invoked. The Legislature of the State of Nebraska saw fit to include the right to demand the assistance of legal counsel when Chapter 29-716 of the Compiled Statutes of Nebraska, Supplement for 1937, was being prepared for passage, for it is stated therein, that:

"29-716. Arrest, Opportunity to Be Given Prisoner to Apply for Writ of Habeas Corpus. No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he has been informed of the demand made for his surrender and of the crime which which he is charged And That He Has the Right to Demand Legal Counsel: * * *"

True enough, the circumstances related to the above quoted statute concern only the subject of extradition, but if it is lawful in the State of Nebraska to appoint counsel to assist the petitioner in a habeas corpus action under one circumstance, it is also lawful in the State of Nebraska to appoint counsel to assist the petitioner in a habeas corpus action under any other circumstances. The Legislature of the State of Nebraska, when preparing Chapter 29-716, supra, fully realized the inability of an ordinary layman to protect his rights, for even the intelligent and educated layman has small and sometimes no skill in the science of law, and therefore provided for the petitioner to have the right to [fol. 61] demand the assistance of legal counsel in a habeas corpus action.

The movant herein, the petitioner in this habeas corpus action, is an uneducated layman who lacks both the skill and knowledge to adequately present his case in open court. As was so properly said by the United States Supreme Court in the recent case of Palko v. Connecticut, 302 U. S. 319, 325, if the petitioner, the movant herein, is not granted, as an impecunious person, the aid and assistance of competent legal counsel, justice will not "still be done."

Wherefore, the movant herein, Albert Smith, respectfully moves this Honorable Court to allow this motion in its entirety, to the end that law and justice may prevail.

Respectfully submitted, Albert Smith, Movant and Petitioner, #11283, Nebraska State Penitentiary, Lincoln, Nebraska.

IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

AFFIDAVIT OF SINCERITY AND POVERTY—Filed February 14, 1940

STATE OF NEBRASKA,
County of Lancaster, ss:

Albert Smith, of lawful age, being first duly sworn upon his oath, deposes and sayeth: That, he is the petitioner in the above entitled cause of action, and that the facts as stated in the attached petition for a writ of habeas corpus,

exhibit, brief argument, and motion are true according to his best knowledge and belief, and that such petition and [fol. 62] supporting documents are filed with all sincerity and truth.

The affiant further deposes and sayeth: That, he is an impecunious person, having no income and possessing no real nor personal property; that, he is a citizen of the United States of America by birth and verily believes he has a meritorious cause of action and is entitled to the redress prayed for in the petition.

Albert Smith, Affiant.

The above Affidavit of Sincerity and Poverty subscribed in my presence and sworn to before me, a duly appointed and authorized Notary Public in and for Lancaster County, Nebraska, this 13th day of December, A. D. 1939.

L. M. Larsen, Notary Public in and for Lancaster County, Nebr. My commission expires November 19th, 1943. (Seal.)

[File endorsement omitted.]

IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

ORDER DISMISSING PETITION—February 28, 1940

Writ of habeas corpus prayed for herein is denied because the petition filed herein does not state a cause of action therefor. It is therefore considered, ordered and adjudged by the Court that this petition for writ of habeas corpus be and hereby is dismissed at costs of plaintiff, taxed at $, [fol. 63] for which execution is hereby awarded.

IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

MOTION FOR RECONSIDERATION ON PETITION FOR WRIT OF HABEAS CORPUS—Filed March 4, 1940

To the Honorable E. B. Chappell, Judge:

Comes now your petitioner, Albert Smith, the movant herein, and respectfully moves this Honorable Court to

reconsider the Order entered by this court, on February 28, 1940, in the above entitled cause of action, and for cause states:

That your petitioner invoked the original jurisdiction of this Court in his petition in a sincere effort, free from collusion or levity, to show this Court that he was, and is now being, restrained and deprived of his liberty contrary to and in violation of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States and Article I Section 3 of the Constitution of the State of Nebraska. Your petitioner showed, to the best of his ability and without the advice or assistance of legal counsel, just how and in what manner his constitutional rights had been violated, and if your petitioner has "not stated a cause of action which permits this court to grant a writ of habeas corpus", it is not because a cause of action is lacking, but rather because petitioner lacks sufficient legal knowledge and language necessary to properly state his cause of action, and because he is without legal counsel to advise and assist in the prosecution of his action.

It is said that the Constitution of the United States is [fol. 64] the Supreme Law of the Land, for it is so written therein. Believing this to be true, and depending upon this Sacred Document as a bulwark of protection from the injustice he is now suffering, your petitioner has taken the liberty to prepare this Motion for Reconsideration.

Following the denial of your petitioner's application for a writ of habeas corpus, this Court wrote the following communication to your petitioner, to-wit:

Febr. 28, 1940.

Mr. Albert Smith, Box 11-283, Lancaster via Lincoln, Nebr.

My dear sir:

The honorable John L. Polk, presiding judge for this district, has assigned to me for disposition your petition for writ of habeas corpus filed in this court. I am sorry to inform you that you have not stated a cause of action which permits this court to grant a writ of habeas corpus, and your application, therefore, has been denied and your petition dismissed at your costs.

Your own petition shows that more than seven years ago in a district court of this state you waived preliminary

hearing, were arraigned upon the information, and pleaded guilty thereto in open court. Under such circumstances the law is that you waived any right to have the information served upon you as contended for in your petition.

The statute, Section 29-2801, provides: "If the person so imprisoned or detained is imprisoned or detained without any legal authority, upon making the same appear to such judge, by oath or affirmation, it shall be his duty forthwith to allow a writ of habeas corpus."

If the statements made in your petition are true, you probably suffered an injustice, but the remedy cannot be by habeas corpus. To obtain release by habeas corpus, the judgment must be absolutely void. Your best remedy, under the circumstances, is before the Parole and Pardon [fol. 65] Board of the State of Nebraska which is composed of men who are always willing to give attention to such matters if they appear to have merit in them.

Respectfully yours, E. B. Chappell.

To this communication your petition can only say that, if this be the true opinion of this Court, then this Court has quite evidently missed the pertinent points of petitioner's argument, and exception is herewith taken to the entire second paragraph and to the last eight words of the first sentence in the fourth paragraph.

This Court states that the petitioner was "arraigned upon the information, and pleaded guilty thereto in open court". This is not true nor was it so stated in the petition. Upon page 20 of the original petition, your petitioner showed how and in what manner he was inveigled, by the suave, underhanded methods of a corrupt official of the trial court to enter a plea of guilty to what your petitioner had been given to understand to be a charge of common burglary. Never has your petitioner ever knowingly entered a plea of guilty to any other charge. Upon discovering this "frame-up", your petitioner objected strenuously, but to no avail. Thus, the court itself became a party to the frame-up. This fact was brought out to the best of your petitioner's ability, yet this Court said that "Under such circumstances the law is that you waived any right to have the information served upon you as contended for in your petition." Does this Court mean to say that the law condones a frame-up? Without knowledge of the true charge which had been filed against him, and without knowledge of

the true intent of the proceedings taking place in court, how can this Court honestly say that your petitioner waived any of the rights of which he was deprived? This Court says that "Under such circumstances the law is * * *" [fol. 66] Just what law does this Court speak of? Surely not the statute, for there is no such statute in the State of Nebraska which condones a framed up, forcible waiver of this nature. True enough, the Supreme Court of Nebraska did so hold in the case of McCarty v. Hopkins, 61 Neb. 550, 85 N. W. 540, and other cases, but can such an opinion as this be held as ruling law when the Supreme Court of the United States has consistently held that "What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it," citing: Twining v. New Jersey, 211 U. S. 78, Powell v. Alabama, 287 U. S. 45; Holmes v. Conway, 241 U. S. 624; and Blackmer v. United States, 284 U. S. 421; and Snyder v. Massachusetts, 291 U. S. 97? Surely this Court will not dispute the fact that a ruling of the Supreme Court of the United States is the ruling law of the land?

This Court also took issue on the fact that your petitioner did not file his application until more than seven years after the pretense of a trial accorded him. The time element in this particular instance has no bearing whatsoever on the legitimacy of petitioner's arguments, because it does not alter the fact that the judgment obtained by false representation and the mere pretense of a trial is void.

In the last paragraph of the previously quoted communication of this Court, it is stated that: "Your best remedy, under the circumstances, is before the Parole and Pardon Board of the State of Nebraska which is composed of men who are always willing to give attention to such matters if they appear to have merit in them" Again this Court has shown that it is not fully acquainted with the contents of your petitioner's petition and supporting brief argument, because on page 3 thereof your petitioner stated that: "In the intervening years your petitioner has made every effort an uneducated layman could possibly make to have this unjust and illegal imprisonment terminated." To this end your petitioner was given a hearing before the afore- [fol. 67] said Board last August 9, 1939, after six (6) years and eleven (11) months imprisonment. Although your petitioner's institutional record does not show a single report of any kind, and although your petitioner's police record

does not show a single arrest prior to his arrest on the instant charge, the Board refused to grant clemency "because of his past record." Furthermore, the Board could not legitimately "give attention to such matters" complained of by your petitioner because of the provisions of Chapter 29-2612 of the Compiled Statutes of Nebraska for 1929, wherein it is stated that:

"29-2612. Board of Pardons, Confined to propriety of extending executive clemency. The board shall in no case assume to act as a court of review to pass upon the correctness, regularity or legality of the proceedings of the trial court, but shall confine itself to a hearing and consideration of those matters only which probably bear on the propriety of extending executive clemency."

Because of your petitioner's ignorance of his right to appeal, and because your petitioner had no attorney to advise him of his appellate rights following his pretense of a trial, and because the Board of Pardons did not see fit to grant clemency, your petitioner has exhausted every corrective means available in the State of Nebraska except Habeas Corpus. Yet, in the previously quoted communication of this Court, it is stated that: "If the statements made in your petition are true, you probably suffered an injustice, but the remedy cannot be by habeas corpus." Strange as it may seem, this quoted statement is practically identical to one made by Mr. Justice Black of the United States Supreme Court in the case of Johnson v. Zerbst, 304 U. S. 458, with the exception that Mr. Justice Black said that habeas corpus was the proper remedy under these circumstances. The petitioner Johnson had exhausted all available means of relief. Because of his ignorance of court procedure he was deprived of the assistance of counsel and the right of appeal. It was impossible for him to [fol. 68] obtain relief in any manner, so he brought habeas corpus into the courts. In the lower court he was denied, just as this Court has denied your petitioner, but when the case eventually got to the United States Supreme Court, Mr. Justice Black said:

"If these contentions be true in fact, it necessarily follows that no legal procedural remedy is available to grant relief for a violation of constitutional rights, unless the courts protect petitioner's rights by Habeas Corpus. Of the con-

tention that the law provides no effective remedy for such a deprivation of rights affecting life and liberty it may well be said—as in Mooney v. Holohan, 294 U. S. 103, 113—that it 'falls with the premise.' To deprive a citizen of his only effective remedy would not only be contrary to the 'rudimentary demands of justice' (Mooney v. Holohan, supra, 112) but destructive of a constitutional guaranty specifically designed to prevent injustice."

Truly, your petitioner cannot accept, seriously, the statement by this Court that "the remedy cannot be by habeas corpus" in the face of the fact that this Court did acknowledge that "If the statements made in your petition are true, you probably suffered an injustice," because such a ruling by this Court would be absolutely contrary to the above quoted ruling of the United States Supreme Court. Surely this Court would not think of contradicting the Supreme Court of the land.

As previously quoted, this Court said: If the Statements made in your Petition are true, you probably suffered an injustice. Because of this fact, if for no other, it is the duty of this Honorable District Court of Nebraska to issue the writ instanter upon application, because

"It is not a question, at the time of the application for the writ, whether or not the facts alleged in the petition are true or false. They are to be verified by the oath of the petitioner, and if he sets out in his petition what is necessary to give a * * * court jurisdiction, the writ *must* issue, *and the truth or falsity of the facts alleged must be determined at the hearing.*" Electoral College Case (C. C. S. C. 1876) 1 Hughes 571, 8 Fed. Cas. No. 4, 336. See also Greenwald (C. C. Cal. 1896) 77 Fed. 590. (Italics supplied.)

These same contentions of law were also upheld in a much later case, because it was stated that:

[fol. 69] "In a habeas corpus proceeding the court is bound to assume the truth of the allegations in the petition." Ex parte Kerekes (D. C. Mich. 1921) 274 Fed. 870.

In denying your petitioner's application for a writ of habeas corpus, this Court apparently took under consideration only the petitioner's first reason relied upon for the issuance of the writ. A further examination by this Court will disclose that there are at least two more reasons why the writ should

issue, namely (1) that your petitioner was deprived of the assistance of counsel, and (2) that the trial court failed to acquire jurisdiction to begin the proceedings which ultimately became the mere pretense of a trial. All of your petitioner's contentions are supported in a manner not to be lightly cast aside. To all of his contentions your petitioner took an oath, verifying that each and every one of them was the truth. The contention and allegation, under oath, that one is restrained and deprived of his liberty unlawfully is sufficient cause to fulfill the requirements of the foregoing quotations rendered by United States Courts. It must follow, then, that the fulfilling of the same requirements would also be sufficient for this Court, because it would also fulfill the requirements of Chapter 29-2801, which also requires an oath or affirmation.

The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. The civil right of personal liberty has been violated in the instant case not only by the respondent but also by this Court, because:

"On application for writ of habeas corpus, the court should proceed summarily to determine the facts and dispose of the party as law and justice require." Copeland v. Archer, (C. C. A. Wash. 1931) 50 F. (2d) 836.

The very nature of this Court's communication to your petitioner indicates that your petitioner has suffered an injustice. Surely "law and justice" do not require this Court to deny your petitioner a hearing on his application for habeas corpus when such an indication of injustice exists. On the [fol. 70] contrary, "Law and justice" require that an immediate and thorough investigation of the facts be made, together with a determination as to just why such injustices can be meted out in the name of the law.

In the case of McCarty v. Hopkins, supra, and in other similar cases, (all of which your petitioner believes this Court to consider "the law") the Supreme Court of Nebraska has held that a plea entered to a criminal charge is an automatic waiver to any constitutional right which might have been obtained before the plea was entered. This holding, of course, is contrary to all the precepts of constitutional law as interpreted by the United States Supreme Court, because it condones the deprivation of fundamental constitutional rights. It condones trickery; it condones the

"third degree"; it condones the deprivation of counsel; it condones any act a trial court may take contrary to law. Why does the opinion in the case of McCarty v. Hopkins, supra, condone all of these violations of constitutional rights? Simply because the average defendant in a criminal action in the State of Nebraska, and your petitioner in particular, is induced, coerced, or duped into entering a plea before he is told that, once upon a time, he did have certain constitutional rights. But after the plea is entered, he no longer has those rights. Is this law and justice? With all due respect to the Supreme Court of Nebraska, it seems to your petitioner that this line of reasoning is a weak excuse to offer unscrupulous courts and court officials a free hand in the manner in which they shall handle ignorant, uneducated, and illiterate defendants in criminal actions. In any event, such a ruling by the Supreme Court of Nebraska cannot be considered the law of the State, because it is contrary to the law of the land, as rendered by the Supreme Court of the United States.

Your petitioner alleged, among other things, a "fix". This, in itself, should be a sufficient allegation to cause this Court [fol. 71] to hold a hearing, that all the matters complained of could be investigated in open court. A District Court of the State of Nebraska has no more right or authority to violate the law than has the alleged criminal whom the District Court is supposed to judge. If the criminal procedural methods in a District Court of Nebraska have not been what they should be, they should be investigated and the truth brought to light where it could be viewed by the general public. Fear should be no part of the investigation.

Without fear of reprisal, your petitioner alleged the deprivation of fundamental constitutional rights involving all of the officials of the trial court. This fact alone indicates a complete and thorough flouting of the Constitution of the United States on the part of the trial court, and further indicated that mobocracy, and not law and justice, prevailed at the time of your petitioner's pretense of a trial. Yet, in the face of all this, this Court said that habeas corpus was not the proper procedure. Your petitioner sincerely believes that if this Court will thoroughly examine all of his petition and supporting brief argument, facts heretofore unknown to this Court will be disclosed.

Wherefore, your petitioner, Albert Smith, the movant herein, respectfully moves this Honorable District Court

of the Third Judicial District of Nebraska to set aside and consider for naught the aforesaid Order, entered February 28, 1940, at Docket V Page 248, wherein this Court dismissed petitioner's application for a writ of habeas corpus; and

Petitioner further moves this Honorable District Court to reconsider petitioner's application for a writ of habeas corpus and to allow the writ as prayed for in accordance with the provisions of Chapter 29-2801, and subsequent chapters, of the Compiled Statutes of Nebraska for 1929; and,

Petitioner further moves this Honorable District Court to grant him the assistance of legal counsel in the hearing [fol. 72] of his case upon the issuance of the aforesaid writ of habeas corpus.

And your petitioner will ever pray.

Respectfully submitted, Albert Smith, Movant and Petitioner.

[File endorsement omitted.]

IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

ORDER OF SUBMISSION—March 5, 1940

Now on this day the application of petitioner for reconsideration is submitted to the court.

IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

ORDER OVERRULING MOTION OF PETITIONER FOR RECONSIDERATION OF CASE—March 11, 1940

This cause now comes on to be heard on motion of petitioner for reconsideration of this case, and having been heretofore submitted to the court, now comes on for final determination, and is overruled by the court, to which petitioner excepts.

[fol. 73] IN DISTRICT COURT OF LANCASTER COUNTY

ACKNOWLEDGMENT—Filed March 20, 1940

V-248

Albert Smith, Box 11-283, Lancaster via Lincoln, Nebr.

DEAR SIR:

I, the undersigned, Walter R. Johnson, Attorney General for the State of Nebraska, do hereby acknowledge receipt of a carbon copy of an original petition for a writ of habeas corpus, wherein Albert Smith is the petitioner and Joseph O'Grady, Warden of the Nebraska State Penitentiary, is the respondent.

I acknowledge receipt of a carbon copy of this petition as counsel for the respondent this 14th day of February, A. D. 1940.

Walter R. Johnson, Attorney General for the State of Nebraska. By George W. Ayres, Assistant Attorney General.

IN DISTRICT COURT OF LANCASTER COUNTY

ACKNOWLEDGMENT—Filed March 20, 1940

Albert Smith, Box 11-283, Lancaster via Lincoln, Nebr.

DEAR SIR:

I, the undersigned, Walter R. Johnson, Attorney General for the State of Nebraska and counsel for the respondent, in the case of Albert Smith, Petitioner, vs. Joseph O'Grady, Warden of the Nebraska State Penitentiary, Respondent, do hereby acknowledge receipt of a carbon copy of the petitioner's Motion for Reconsideration for Writ of Habeas Corpus.

Service made this 4th day of March, A. D., 1940.

Walter R. Johnson, Attorney General for the State of Nebraska and Counsel for the Respondent. By C. S. Beck, Assistant Attorney General.

[File endorsement omitted.]

[fol. 74] IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

MOTION TO APPOINT COUNSEL—Filed March 25, 1940

Comes now the movant, Albert Smith, who is the appellant in the above entitled cause of action, and respectfully moves this Honorable Court to appoint an attorney to aid and assist him in the preparation of his appeal from the final order and judgment of this Court, in the above entitled cause of action, to the Supreme Court of the State of Nebraska, said final order and judgment of this Court being to dismiss the appellant's original petition for a writ of habeas corpus.

The movant states that, because of his poverty, he is unable to secure the aid or assistance of competent legal counsel, and it is herein respectfully requested that this Court allow counsel fees so incurred to be taxed to Lancaster County, Nebraska, as costs and audited as per the provisions of Chapter 29-1803 of the Compiled Statutes of Nebraska for 1929, and as required by the interpretation of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States by the Supreme Court of the United States.

The movant herein has invoked his constitutional and statutory right to the assistance of counsel, as shown in the preceding paragraphs, on the ground that habeas corpus is still habeas corpus no matter under what circumstances or under what conditions it may be invoked. The Legislature of the State of Nebraska saw fit to include the right to demand the assistance of legal counsel when Chapter [fol. 75] 29-716 of the Compiled Statutes of Nebraska, Supplement for 1937, was being prepared for passage, for it is stated therein, that:

"29-716. Arrest, Opportunity to be Given Prisoner to Apply for Writ of Habeas Corpus. No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he has been informed of the demand made for his surrender and of the crime with which he is charged AND THAT HE HAS THE RIGHT TO DEMAND LEGAL COUNSEL: * * *." (Capitals supplied.)

True enough, the circumstances related to the above quoted statute concern only the subject of extradition, but, in habeas corpus, there is one thing that never changes. The One for Whom the Writ is Being Sued Out is Always the Petitioner, and, regardless of the fact that habeas corpus is considered to be a civil procedure in the State of Nebraska (although it is criminal in nature), and regardless of the fact that the laws of Nebraska do not provide a method of supplying counsel for the plaintiff in a civil action, if it is lawful for a court of record of the State of Nebraska to appoint counsel to assist the petitioner in a habeas corpus action under one circumstance, it is also lawful for a court of record of the State of Nebraska to appoint counsel to assist the petitioner in a habeas corpus action under any other circumstance. In his original petition the appellant (the petitioner therein) requested the assistance of legal counsel to aid and advise him in the prosecution of his case. This request was made by motion to this Court, but, so far as the appellant knows, his motion was ignored and never acted upon. This is contrary to the rudimentary demands of justice as laid down by the Supreme Court of the United States and as imbed-ed in the Fourteenth Amendment to the Constitution of the United States, wherein due process of law and equal protection of the laws is provided for all citizens and residents of the United States. The appellant is a citizen of the United States.

When preparing Chapter 29-716, supra, for enactment, [fol. 76] the Legislature of the State of Nebraska fully realized the inability of an ordinary layman to protect his rights, for even the — intelligent and uneducated layman has small and sometimes no skill in the science of law, and therefore provided that the petitioner in a habeas corpus action shall have the right to demand the assistance of legal counsel. The appellant's ability to protect his rights, or his knowledge of the intricacies of an appeal, have not been increased by the fact that his action does not come under the provisions of the aforesaid Chapter 29-716, supra. He is still the same unintelligent, ignorant, and uneducated layman that he would be had this action been invoked under the provisions of the aforesaid Chapter 29-716, supra, and under the provisions of which this Court would appoint counsel upon the demand for same.

The movant herein, the appellant in this habeas corpus action, is an uneducated layman who lacks both the skill and knowledge to adequately prepare an appeal. He also lacks the funds necessary to hire competent legal counsel to prepare an appeal. As was so properly said by the United States Supreme Court in the case of Palko v. Connecticut, 302 U. S. 319, 325, "justice will not still be done" if the appellant, the movant herein, is not granted, as an impecunious person, the aid and assistance of competent legal counsel to prepare his appeal.

Wherefore, the movant herein, Albert Smith, who is the appellant in this action, respectfully moves this Honorable Court to allow this motion in forma pauperis, to the end that law and justice may prevail.

Respectfully submitted, Albert Smith, Movant and Appellant.

Duly sworn to by Albert Smith. Jurat omitted in printing.

[fol. 77] [File endorsement omitted.]

IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

MOTION TO ALLOW COST OF PRINTED BRIEFS FOR APPEAL—Filed March 25, 1940

Comes now the movant, Albert Smith, who is the appellant in the above entitled cause of action, and respectfully moves this Honorable Court to allow cost of printed briefs for appeal, the costs so incurred to be taxed to Lancaster County, Nebraska.

The movant states that, because of his poverty, he is unable to pay the cost of printing said briefs on his appeal to the Supreme Court of Nebraska, and that his briefs must be printed in order to comply with the rules of the said Supreme Court of Nebraska.

Wherefore, the movant herein, Albert Smith, who is the appellant in this action, respectfully moves this Honorable Court to allow this motion in forma pauperis, to the [fol. 78] end that law and justice may prevail.

Respectfully submitted, Albert Smith, Movant and Appellant.

Duly sworn to by L. M. Larsen. Jurat omitted in printing.

[File endorsement omitted.]

IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

FORMA PAUPERIS AFFIDAVIT—Filed March 25, 1940

STATE OF NEBRASKA,
County of Lancaster, ss:

Comes now the affiant, Albert Smith, who is the appellant in the above entitled cause of action, and respectfully prays [fol. 79] that this Honorable Court grant him leave to prosecute his appeal from the adverse ruling of this District Court of the Third Judicial District of Nebraska to the Supreme Court of Nebraska as an impecunious person.

Affiant states that, because of his poverty, he is unable to pay the Clerk's fees for the preparation of the transcript, or any other cost attached to the aforesaid appeal, and that he has no real nor personal property to give as security for such costs.

Affiant states that he verily believes he has a meritorious cause of action and that he is entitled to the redress sought in his original petition and this appellate action.

Wherefore, affiant prays that he be awarded the right to appeal and proceed with his cause of action as an impecunious person as herein requested and to prosecute same to a conclusion without cost, and affiant will ever pray.

Albert Smith, Affiant.

I, L. M. Larsen, a duly appointed and authorized Notary Public in and for Lancaster County, Nebraska, to hereby certify that the above and foregoing Forma Pauperis Affidavit was subscribed in my presence and sworn to before me this 22 day of March, 1940.

L. M. Larsen, Notary Public in and for Lancaster County, Nebr. My commission expires November 19th, 1943. (Seal.)

[File endorsement omitted.]

IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed March 25, 1940

[fol. 80] To the Clerk of the District Court of the Third Judicial District of Nebraska, Lincoln, Nebraska:

Notice is hereby given you that Albert Smith, the petitioner in the above entitled cause of action and the appellant herein, has this day taken his appeal from the final order and judgment of the District Court of the Third Judicial District of Nebraska in and for Lancaster County, dismissing the petition for a writ of habeas corpus and refusing to grant relief prayed for therein, to the Supreme Court of the State of Nebraska, said order dismissing said petition being made and entered of record on or about the 28th day of February, 1940.

Albert Smith, Appellant.

[File endorsement omitted.]

IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR APPOINTMENT OF COUNSEL—March 26, 1940

This cause now comes on to be heard on motion of appel-
[fols. 81-83] lant Albert Smith for the appointment of counsel to prepare appeal from judgment of this court to the Supreme Court and is submitted to the court, on due consideration whereof, the Court doth overrule said motion, to which appellant excepts.

IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

ORDER OVERRULING MOTION TO ALLOW COST OF PRINTED BRIEFS FOR APPEAL—March 26, 1940

This cause now comes on to be heard on motion of appellant Albert Smith for order allowing the cost of printed appeal to Supreme Court in this action to be taxed to Lan-

caster County, Nebraska, and is submitted to the court, on due consideration whereof, the Court doth overrule said motion, to which appellant excepts.

Praecipe for transcript omitted in printing.

[fols. 84-85] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 86] IN SUPREME COURT OF NEBRASKA

ALBERT SMITH, Petitioner and Appellant,

v.

JOSEPH O'GRADY, Warden of the Nebraska State Penitentiary, Respondent and Appellee

MOTION FOR THE APPOINTMENT OF COUNSEL AND MOTION FOR ALLOWANCE OF COST OF PRINTED BRIEFS ON APPEAL AND ALTERNATE MOTION FOR PERMISSION TO FILE TYPEWRITTEN BRIEFS OF APPEAL AND ALTERNATE MOTION FOR APPEAL TO BE HEARD ON RECORD—Filed April 29, 1940

Comes now the movant, Albert Smith, who is the appellant in the above entitled cause of action, and respectfully moves that this Honorable Court appoint an attorney to aid and assist the appellant in the intracacies of his appeal. The right to the assistance of legal counsel is here invoked, in forma pauperis, under color of authority of Chapters 29-716 and 29-1803 of the Compiled Statutes of Nebraska for 1929 and supplements for 1937, and the Fourteenth Amendment to the Constitution of the United States. This statutory and constitutional right to the assistance of counsel is invoked on the ground that, no matter what the circumstances may be wherein habeas corpus is sought by a petitioner, the action is always of a civil nature and the petitioner is always the plaintiff, and the rights allowed to one petitioner for habeas corpus by the laws of a state must also be allowed to all petitioners for habeas corpus in the same state, because if this practice be not followed, there will be no equal protection of the laws of that state as required by the Fourteenth Amendment to the Constitution of [fol. 87] the United States. Chapter 29-1803 of the Compiled Statutes of Nebraska for 1929 provides for the ap-

pointment of counsel in criminal actions in the State of Nebraska, and also provides a manner wherein said appointed counsel may receive just compensation for their services. Chapter 29-716 of the Compiled Statutes of Nebraska, Supplement for 1937, provides for the appointment of legal counsel to aid and assist the petitioner for a writ of habeas corpus in an extradition proceeding, because therein it is stated that:

"Ch. 29-716. Arrest, Opportunity to be Be Given Prisoner to Apply for Writ of Habeas Corpus. No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he has been informed of the demand made for his surrender and of the crime with which he is charged *and that he has the right to demand legal counsel;* and if the prisoner, his friends or counsel shall state that he or they desire to test the legality of the arrest, the prisoner shall be taken forthwith before a judge of a court of record in this state, who shall fix a reasonable time to be allowed him within which *to apply for a writ of habeas corpus;* and, when such writ is applied for, notice * * *." (Italics supplied.)

The Fourteenth Amendment to the Constitution of the United States provides, among other things, that:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; * * * nor deny to any person within its jurisdiction the equal protection of the laws."

The appellant herein is a citizen of the United States. To deny him the right to the assistance of counsel would be an abridgment of his privileges and a denial of equal protection of the laws of the State of Nebraska contrary to the requirements of the Fourteenth Amendment, supra. The movant herein is an uneducated layman 63 years of age who lacks both the skill and knowledge to adequately present his appeal to this Court. It is, therefore, the duty of this Court to appoint counsel to aid and assist the appellant as requested herein, in order that law and justice may prevail.

The movant herein, Albert Smith, further respectfully moves this Honorable Court to issue an order allowing the

[fol. 88] appellant the cost of printing his briefs on appeal in the instant case, the cost of same to be taxed by this Court jointly to Lancaster County and the State of Nebraska. The appellant is a pauper and is, therefore, unable to pay this cost. This fact is shown by the attached forma pauperis affidavit. However, if this Court does not consider it advisable to allow this cost, the movant respectfully presents the following alternate motion for the consideration of this Court.

Comes now the movant, Albert Smith, and respectfully moves this Honorable Court that, if the foregoing Motion for Allowance of Cost of Printed Briefs on Appeal be denied, an order be issued allowing the appellant the right to file typewritten briefs for his appeal. As shown by the attached affidavit, the appellant is a pauper and is, therefore, entitled to this right as a matter of equal justice to all. Other persons, also declared paupers by affidavit, have been permitted by this Court to file typewritten briefs when they lacked the wherewithal with which to have appellate briefs printed as required by this Court. Some of the recent cases dealt with in this manner are as follows:

Hawk v. O'Grady, No. 30708 Nebraska Supreme Court, Allowed to file typewritten briefs May 25, 1939;

Alexander v. O'Grady, No. 30743 Nebraska Supreme Court, Allowed to file typewritten briefs July 3, 1939;

Thompson v. O'Grady, No. 30714 Nebraska Supreme Court, Allowed to file typewritten briefs July 17, 1939;

Davis v. O'Grady, No. 30759 Nebraska Supreme Court, Allowed to file typewritten briefs Sept. 16, 1939;

Dunham v. O'Grady, No. 30778 Nebraska Supreme Court, Allowed to file typewritten briefs Sept. 16, 1939;

Bartel v. O'Grady, No. 30807 Nebraska Supreme Court, Allowed to file typewritten briefs Sept. 16, 1939.

In each of the six foregoing cases, the appellant was a pauper, just as the appellant in the instant case. The Fourteenth Amendment to the Constitution of the United States guarantees that:

[fol. 89] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; * * * nor deny to any person within its jurisdiction the equal protection of the laws."

The appellant is a citizen of the United States by birth, and as such he is entitled to the full protection of the Constitution of the United States. This Court has, by its past actions, set a precedent which cannot be justifiably retracted. The above quotation from the Fourteenth Amendment, supra, literally commands that equal justice be accorded to all citizens of the United States; partiality and discrimination can play no part in the administration of justice. And, because "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, *shall not be denied*" (Art. I Sec. 24, Const. of Nebr.), and, because the appellant is a pauper who is unable to provide printed briefs for his appeal, the appellant respectfully moves that this Honorable Court consider the attached sample typewritten brief, fifteen (15) identical copies of which the appellant wishes to file in order to complete his appeal as provided by law; and, upon consideration thereof, that this Honorable Court issue an order allowing the appellant to file fifteen additional copies as per the attached sample brief. However, if this Court does not see fit to allow the appellant to file typewritten briefs as herein requested, the appellant, the movant herein, respectfully presents the following alternate motion for the consideration of this Court.

Comes now the movant, Albert Smith, and respectfully moves this Honorable Court that, if the foregoing Motion for Allowance of Cost of Printed Briefs on Appeal, and the alternate Motion for Permission to File Typewritten Briefs on Appeal, both be denied, an order be issued allowing the appellant the right to have his appeal heard upon the record. Article I Section 24 of the Constitution of Nebraska provides that:

[fol. 90] "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, *shall not be denied.*" (Italics supplied.)

This motion is a last resort insofar as the appellant is concerned. Paraphrasing the above constitutional quotation, the right to have an appeal on a habeas corpus action shall not be denied to a pauper. The appellant herein has shown that he is a pauper who is unable to pay the cost of printed briefs on appeal; the appellant has respectfully requested the right to file typewritten briefs on appeal; the appellant has herein requested that if permission be not granted him to file typewritten briefs, he be permitted to have his appeal heard upon the record. If the appellant cannot pay for printed briefs, and if this Court will not hear his appeal either on typewritten briefs or on the record, how, in the name of all that is just, can the provisions of Article I Section 24 of the Constitution of Nebraska, supra, be fulfilled? Would it be equal protection of the laws and due process of law if it were only possible for a rich man, who could pay for the cost of printed briefs on appeal, to have an appellate hearing in this Court? Should Article I Section 24 of the Constitution of Nebraska be inte-preted to read that "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied; Provided, that the appellant be not a pauper"? Considering all these facts, the appellant herein respectfully moves that, if the Motion for Allowance of Cost of Printed Briefs on Appeal, and the alternate Motion for Permission to File Typewritten Briefs on Appeal, both be denied, the appellant herein be allowed to file typewritten Errors Relied Upon for Reversal as shown in the attached sample brief and thereafter have his appeal heard upon the record as prepared by the Clerk of the Lancaster County District Court.

The appellant, Albert Smith, who is the movant herein, further respectfully moves this Honorable Court to consider these motions instanter, and, upon consideration thereof, to issue an order to the Clerk of this Court instruct-
[fol. 91] ing him to deliver to the appellant a certified copy of the Orders made by this Court upon these motions.

Respectfully submitted, (Signed) Albert Smith,
Movant and Appellant.

IN SUPREME COURT OF NEBRASKA

[Title omitted]

AFFIDAVIT OF SINCERITY AND POVERTY—Filed April 29, 1940

STATE OF NEBRASKA,
County of Lancaster, ss:

Albert Smith, the affiant herein, of lawful age, being first duly sworn upon his oath, deposes and sayeth: That, he is the appellant in the above entitled cause of action, and that the facts as stated in the attached Motion for the Appointment of Counsel, Motion for Allowance of Cost of Printed Briefs on Appeal, Motion for Permission to File Typewritten Briefs on Appeal, and Motion for Appeal to Be Heard on Record are true ccording to his best knowledge and belief and that such motions are filed with all sincerity and truth.

The affiant herein further deposes and sayeth: That, he is an impecunious person, that he has no money with which to finance the cost of printing briefs on appeal in the above entitled cause of action, and that he has no real nor personal property to give as security for cost of same.

(Signed) Albert Smith, Affiant.

The above and foregoing Affidavit of Sincerity and Poverty subscribed in my presence and sworn to before me this 23 day of April, A. D., 1940.

[fol. 92] (Signed) L. M. Larsen, Notary Public in and for Lancaster County, Nebr. (Seal.)

My commission expires November 19th, 1943.

[File endorsement omitted.]

[fols. 93-117] Brief of Appellant omitted in printing.

[fols. 118-120] Motion for Extension of Time for Filing of Appellant's Brief omitted in printing.

[fols. 121-122] IN SUPREME COURT OF NEBRASKA

[Title omitted]

ORDER DENYING MOTION FOR APPOINTMENT OF COUNSEL, ETC.
May 20, 1940

This cause coming on for hearing upon motion of appellant for the appointment of counsel and for the allowance

of the cost of printed briefs on appeal, or in the alternative for leave to file typewritten briefs, or to be heard upon the record, to which motion was attached typewritten brief which appellant asked leave to file, was submitted to the court. And the court having examined the transcript from the district court of Lancaster county, which transcript contains appellant's original petition for writ of habeas corpus containing a brief in support of such petition, and having also examined the typewritten brief of appellant tendered herein, and being fully advised in the premises, finds that the appeal herein is without merit and that the record contains no probable error. It is, therefore, considered, ordered and adjudged that said motion be, and the same hereby is, denied.

Robert G. Simmons, Chief Justice.

[fols. 123-124] IN SUPREME COURT OF NEBRASKA

No. 30990

ALBERT SMITH, Appellant,

v.

JOSEPH O'GRADY, Warden of the Nebraska State Penitentiary, at Lancaster, Lancaster County, Nebraska, Appellee

Appeal from the District Court of Lancaster County

JUDGMENT—June 3, 1940

This cause coming on to be heard upon appeal from the district court of Lancaster county, the same having been reached in its regular order, and no briefs appearing on file as required by the rules of court, it is by the court considered, ordered and adjudged that the judgment of said district court be, and hereby is, affirmed; that appellant pay all costs incurred herein, taxed at $——; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Robert G. Simmons, Chief Justice.

[fols. 125-126] Application for Stay of Issuance of Mandate omitted in printing.

[fol. 127] IN SUPREME COURT OF NEBRASKA

[Title omitted]

MOTION IN FORMA PAUPERIS FOR ORDER ALLOWING PREPARATION OF TRANSCRIPT AND APPOINTMENT OF COUNSEL—Filed June 10, 1940

Comes now the movant, Albert Smith, the petitioner and appellant in the above entitled cause of action, who, feeling sorely aggrieved by the adverse judgment heretofore entered by this Court in the above entitled cause of action on the 3rd day of June, 1940, respectfully moves that an order be issued, directed to the Clerk of this Court, instructing the said Clerk to prepare and deliver to the movant, Albert Smith, without cost, a complete and certified transcript, typewritten, of the record in the above entitled cause of action as requested in the attached praecipe for the transcript, to the end that the movant may abstract the record and prepare his petition to the Supreme Court of the United States for a writ of certiorari,

And, because he is a person of little education and possessing no legal knowledge, the movant herein, Albert Smith, further respectfully moves this Honorable Court to issue an order appointing legal counsel to aid and assist him in the preparation of his petition to the Supreme Court of the United States for a writ of certiorari.

The movant herein states that, because of his poverty, he is unable to pay the Clerk of this Court the required fees for the preparation of the aforesaid transcript or for the certification thereto affixed, and that, also because of such poverty, he is unable to retain competent legal counsel to aid and assist him in the preparation of his petition for a writ of certiorari, and that he has no real or personal prop-
[fol. 128] erty to offer as security for either or any of the above costs.

The movant herein further states that he is a citizen of the United States of America by birth, that he verily believes he has a meritorious cause of action and is entitled to the redress he seeks by the indicated action of certiorari.

This motion, which is made in all truth and sincerity and without collusion or levity, is pleaded on the ground that the petitioner-appellant must have an opportunity to examine and abstract the record in order to prepare his petition to the Supreme Court of the United States for a writ

of certiorari and it is only by this procedure that the petitioner-appellant can comply with Rule 38 Paragraph 1 of the Revised Rules of the Supreme Court of the United States as per February 27, 1939, which requires that:

"A petition for review on writ of certiorari of a decision of a state court of last resort, * * *, shall be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed."

Wherefore, the movant herein, Albert Smith, respectfully requests that this motion in forma pauperis be allowed in its entirety, to the end that the petitioner-appellant may have an opportunity to examine and abstract the aforesaid transcript of record and prepare the aforesaid petition for a writ of certiorari, and it is further respectfully requested that an order allowing this motion in its entirety shall issue forthwith.

Respectfully submitted, (Signed) Albert Smith,
Movant.

Duly sworn to by Albert Smith. Jurat omitted in printing.

[fols. 129-130] [File endorsement omitted.]

[fols. 131-132] IN SUPREME COURT OF NEBRASKA

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATE—June 17, 1940

This cause coming on to be heard upon motion of appellant that issuance of mandate be withheld, was submitted to the court; upon due consideration whereof, it is by the court ordered that said motion be, and hereby is, sustained, and issuance of mandate herein is directed to be withheld until September 3, 1940.

Robert G. Simmons, Chief Justice.

[fols. 133-134] IN SUPREME COURT OF NEBRASKA

[Title omitted]

ORDER DIRECTING PREPARATION OF TRANSCRIPT, ETC.—June 17, 1940

This cause coming on to be heard upon motion of appellant for an order directing the Clerk of this court to prepare a certified transcript on writ of certiorari to the Supreme Court of the United States, and for the appointment of counsel for appellant, was submitted to the court; upon due consideration whereof, it is by the court ordered that the Clerk of this court be, and he hereby is, directed to prepare for appellant a certified transcript on petition for writ of certiorari to the Supreme Court of the United States, upon the filing by appellant of a praecipe designating the portions of the record to be included. It is further ordered that in all other respects said motion be, and hereby is, denied for want of statutory authorization.

Robert G. Simmons, Chief Justice.

[fols. 135-137] Stipulation as to the Transcript of Record omitted in printing.

[fols. 138-139] Praecipe for Transcript of Record omitted in printing.

[fol. 140] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 141] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1940

The petition herein for a writ of certiorari to the Supreme Court of the State of Nebraska is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Albert Smith, pro se. In forma pauperis. File No. 44,713 Nebraska, Supreme Court, Term No. 364. Albert Smith, Petitioner, vs. Joseph O'Grady, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska. Petition for a writ of certiorari and exhibit thereto. Filed August 22, 1940. Term No. 364 O. T. 1940.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 364

ALBERT SMITH,

Petitioner,

vs.

JOSEPH O'GRADY, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA AND BRIEF IN SUPPORT THEREOF.

ALBERT SMITH,
Pro se.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 364

ALBERT SMITH,

vs. *Petitioner,*

JOSEPH O'GRADY, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Albert Smith, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Nebraska entered in the above cause on June 3, 1940, affirming the judgment of the District Court of Lancaster County, Nebraska.

Summary Statement of the Matter Involved.

The petitioner, Albert Smith, filed his petition for a writ of habeas corpus in the District Court of Lancaster County, Nebraska, on or about February 14, 1940, complaining of his detention in the State Penitentiary of Nebraska, at Lincoln, alleging that he is being held in violation of his constitutional rights (R. 1-13).

On or about September 19, 1932, your petitioner, an itinerant chimney sweep who was 56 years of age and without the slightest vestige of a criminal record at the time, was arrested at Arapahoe, Furnas County, Nebraska, without a warrant and detained in the Furnas County jail. Later the same day your petitioner was removed to the Buffalo County jail at Kearney, Nebraska, where he was held for two days without being told of the cause of his arrest. On the third day after his arrest your petitioner was told that he was wanted in Valley County, Nebraska, on a charge of Common Burglary, and was advised that if he would agree to plead guilty to the charge he would be dealt with leniently; if he did not so agree, he might be accidentally and seriously injured. With no other recourse to follow, your petitioner agreed, on the condition that such an arrangement was first sanctioned by the County Attorney of Valley County. Accordingly, the Valley County Sheriff, Mr. George S. Round, arranged for your petitioner to talk by long distance telephone with Mr. George A. Munn, the County Attorney of Valley County. Then, in the presence of Sheriff Round and Mr. Otto Dudschus, a Deputy Sheriff of the State of Nebraska, your petitioner conversed, by long distance telephone, with a person identified by Sheriff Round as Mr. Munn, who was likewise identified as being the County Attorney of Valley County. During this conversation Mr. Munn agreed to a bargain in which it was understood that if your petitioner would plead guilty to a charge of Common Burglary, the sentence meted out to him by the trial court would not exceed three (3) years imprisonment in the Nebraska State Penitentiary. Following this telephone conversation and agreement, your petitioner was transferred to the Hall County jail at Grand Island, Nebraska, by the aforesaid Mr. Dudschus, where he was confined for about three more days. Then, on or about September 24, 1932, your petitioner was taken to the

Valley County jail at Ord, Nebraska, and there confined pending trial.

During the following two or three days your petitioner had many conversations with Sheriff Round and County Attorney Munn, and on each occasion your petitioner requested these officials to give him a copy of the charge filed against him. In response, your petitioner was told that the charge had not yet been filed, that it was not necessary for him to have a copy anyway, THAT EVERYTHING HAD BEEN "FIXED." Finally, on or about September 27, 1932, at about 1:30 in the afternoon, WITHOUT EVER HAVING HAD A COPY OF A CHARGE SERVED UPON HIM (R. 15), AND WITHOUT ANY KNOWLEDGE THAT A CHARGE HAD YET BEEN FILED, your petitioner was taken before the District Court of the Eleventh Judicial District of Nebraska, in and for Valley County, and summarily arraigned for trial. Upon being advised of this fact by the court, your petitioner requested the advice and assistance of legal counsel, but was informed by the court that counsel was not necessary because of the agreement made between the County Attorney and the defendant, your petitioner. Because of this statement by the court, your petitioner truly believed that the case had been "fixed" as promised, and, with the blind faith of a man trusting his friends (the Sheriff and the County Attorney of Valley County), your petitioner paid little attention to a charge unintelligibly read in the jargon of the courtroom and, when requested to do so by the County Attorney, entered a plea of guilty. To his consternation, your petitioner then heard the court sentence him to a term of twenty (20) years imprisonment in the Nebraska State Penitentiary.

Your petitioner had never before been in a courtroom for any purpose whatsoever, and his knowledge of law and legal procedure was, and still is, extremely limited. Notwithstanding this fact, and immediately after recovering

his mental equilibrium, your petitioner protested vigorously to the court, explaining that he had never seen a copy of the charge filed against him, although he had requested a copy of it several times. This protest was ignored, so your petitioner requested permission of the court to withdraw his plea of guilty, and, at the same time, again requested that counsel be appointed to advise and assist him, and that he be given an adequate opportunity to defend himself. But these requests and protests were all to no avail, for the court told your petitioner that it did not matter whether or not he had seen a copy of the charge filed against him; that it did not matter whether or not he had the aid and advice of legal counsel; that a plea of guilty could not be withdrawn in that court; that it did not matter, now, whether or not he had had an adequate opportunity to defend himself, because he had pleaded guilty to the charge as filed and that settled it, insofar as the court was concerned. Further protest was useless, and, within the hour, your petitioner was on his way to the penitentiary in the custody of Sheriff Round.

Not until after your petitioner was committed to the penitentiary did he discover that he had been duped and inveigled into entering a plea of guilty to a charge of burglary with explosives, and not until seven (7) years later, in October, 1939, did your petitioner actually see a copy of the charge, and then only after he had purchased it for the sum of one dollar and fifty cents, ($1.50). Being without the necessary funds, and knowing nothing at that time of appellate procedure, your petitioner was unable to carry an appeal to the Supreme Court of Nebraska. Likewise, his entreaties to the Board of Pardons of the State of Nebraska have been equally futile.

Finally, in desperation, after purchasing a certified copy of the Information, Judgment, and Sentence (R. 6-10, incl., "Exhibit A"), as the same appears of record in

the office of the Clerk of the Valley County District Court, and, upon the foundation laid by these records of the trial court, your petitioner prepared a petition for a writ of *habeas corpus*. This petition was filed with the District Court of Lancaster County, and alleged that the judgment and sentence of twenty years, and your petitioner's confinement as a result thereof, are void by reason of the fact that (1) the petitioner was deprived of his constitutional right to know the nature and cause of the accusation for which he was to answer, and to be served with a copy thereof, (2) the petitioner was deprived of his constitutional right to have the advice and assistance of competent legal counsel; (3) the petitioner was deprived of his constitutional right to trial by a court of competent jurisdiction, and (4) the petitioner did not knowingly wilfully, intelligently, nor expressly waive any of the three foregoing rights, each of which is guaranteed by the Sixth Amendment to, and imbedded in the due process clause of the Fourteenth Amendment to, the Constitution of the United States; and the deprivation of each right is a denial of the equal protection and due process of law guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States. Attached to and made a part of this petition for *habeas corpus* was a motion and affidavit *in forma pauperis*, requesting the appointment of legal counsel to assist in the preparation and prosecution of petitioner's action.

Finally, on or about February 28, 1940, after ignoring the aforesaid motion for the appointment of counsel, the District Court of Lancaster County dismissed the petition for a writ of *habeas corpus* without a hearing (R. 13). Following this dismissal, the Honorable E. B. Chappell, Judge of the Lancaster County District Court, wrote your petitioner a letter, informing him that, "IF THE STATEMENTS MADE IN YOUR PETITION ARE TRUE, YOU PROBABLY SUFFERED AN INJUSTICE," (R. 15).

Feeling certain that a misunderstanding existed, your petitioner filed a motion for reconsideration, hoping that the Court would take the time and trouble to verify the statements your petitioner had made in his original petition (R. 13-21). But the court took no such action, and this motion, too, was overruled (R. 21). Sincerely believing that he had again suffered an injustice at the hands of a court of the State of Nebraska, your petitioner immediately instituted appellate proceedings *in forma pauperis,* requesting by motion, among other things, the appointment of counsel to assist in the preparation of the appeal (R. 23-25). This motion was also overruled (R. 27).

Feeling certain that justice would prevail in the Supreme Court of Nebraska, your petitioner prepared his own appeal and, on or about April 29, 1940, filed a transcript of the proceedings in the District Court of Lancaster County with the Clerk of the Supreme Court of Nebraska, together with a motion for the appointment of counsel, a motion for allowance of cost of printed briefs on appeal, an alternate motion for permission to file typewritten briefs on appeal with a sample brief attached as showing for the consideration of the court, and an alternate motion for appeal to be heard on the record, all in forma pauperis (R. 1-33, incl. For above motions, see R. 28-33).

In the above cited motions, your petitioner pointed out to the Supreme Court of Nebraska that he was a pauper, that he was making every effort a pauper could make to complete his appeal in accordance with the rules of the court, and that, unless one of the aforesaid motions was allowed, he could not possibly complete his appeal. Likewise, your petitioner pointed out to the Supreme Court of Nebraska that Article I Section 24 of the Constitution of the State of Nebraska forbade the denial of the right to appeal, and that a denial of all of the aforesaid motions would be tantamount to a denial of the right to appeal because of

the petitioner's impoverished circumstances. IN SUPPORT OF HIS MOTIONS, YOUR PETITIONER POINTED OUT TO THE SUPREME COURT OF NEBRASKA THAT IT HAD, ON AT LEAST SEVEN (7) PREVIOUS OCCASIONS DURING THE PAST YEAR, ALLOWED IMPOVERISHED APPELLANTS THE RIGHT TO FILE TYPEWRITTEN BRIEFS, AND THAT EQUAL JUSTICE TO ALL PAUPERS COULD ONLY BE METED OUT BY ALLOWING YOUR PETITIONER THE SAME RIGHT (R. 30-31). In support of his appeal, your petitioner charged the following errors to the District Court of Lancaster County in his sample brief attached for showing: (1) The court erred in holding that the deprivation of the appellant's right to know the nature and cause of the accusation for which he was to answer, or to be served with a copy thereof, is not a denial of the equal protection and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. (2) The court erred in holding that the deprivation of the appellant's right to have the advice and assistance of competent legal counsel is not a denial of the equal protection and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. (3) The court erred in holding that the deprivation of the appellant's right to a trial by a court of competent jurisdiction is not a denial of the equal protection and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. (4) The court erred in holding that a plea of guilty seduced from the defendant, the appellant herein, by an unfulfilled promise of leniency is a waiver of all constitutional rights and is not a denial of the equal protection and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. (5) The court erred in holding that the denial of the equal protection and due process of law guaranteed

by the Fourteenth Amendment to the Constitution of the United States is not grounds for the issuance of a writ of *habeas corpus*.

Afterwards, on May 20, 1940, UPON CONSIDERATION OF THE AFORESAID MOTIONS AND THE ERRORS CHARGED IN THE SAMPLE BRIEF ATTACHED THERETO FOR SHOWING, the Supreme Court of Nebraska, by the Chief Justice thereof, the Hon. Robert G. Simmons, rendered the following order:

> "This cause coming on for hearing upon motion of appellant for the appointment of counsel and for the allowance of the cost of printed briefs on appeal, or in the alternative for leave to file typewritten briefs, or to be heard upon the record to which motion was attached typewritten brief which appellant asked leave to file, was submitted to the court. And the court having examined the tr nscript from the district court of Lancaster county, which transcript contains appellant's original petition for writ of *habeas corpus* containing a brief in support of such petition, and having also examined the typewritten brief of appellant tendered herein, and being fully advised in the premises, finds that the appeal herein is without merit and that the record contains no probable error. It is, therefore, considered, ordered and adjudged that said motion be, and the same hereby is, denied." (R. 33-34.)

Considering this action of the Supreme Court of Nebraska to be adverse to the true concepts of equal justice to all, and in an effort to obtain the pauper's prerogative, the right to file typewritten briefs, and thus complete his appeal, your petitioner sought permission of this Honorable Supreme Court of the United States to file a petition for a writ of *mandamus*, naming the Supreme Court of Nebraska, and all of the members thereof individually, as respondents. On June 3, 1940, this Honorable Court denied the petitioner's motion for permission to file the aforesaid peti-

tion for a writ of mandamus, and, on the same date, the Supreme Court of Nebraska rendered a final judgment affirming the dismissal of your petitioner's original petition for a writ of *habeas corpus* by the District Court of Lancaster County (R. 34). It is this final judgment of the Supreme Court of Nebraska, and the proceedings in the courts of the State of Nebraska leading up to this final judgment, which your petitioner wishes to have reviewed by this Honorable Court by the process of *certiorari*.

Jurisdiction.

1.

The statutory provision is United States Judicial Code, Section 237b, as amended February 13, 1925, 43 Stat. 937.

2.

The date of judgment, which has not been officially reported, is June 3, 1940, on which date the Supreme Court of the State of Nebraska, the highest court of the State in which a decision could be had where any title, right, privilege, or immunity is specially set up or claimed under the Constitution of the United States, rendered a final judgment affirming the order and judgment of the District Court of Lancaster County, Nebraska, denying the petitioner's petition for a writ of *habeas corpus* (R. 34). There was no opinion rendered by the Supreme Court of Nebraska.

3.

That the nature of the case and the rulings below bring the case within the jurisdictional provisions of Section 237b, *supra*, appears from the following:

The petitioner herein specifically raised four separate and distinct Federal questions in his original petition for a writ of *habeas corpus* (R. 4-6), all of which were

considered and ambiguously denied by the District Court of Lancaster County in a blanket dismissal of the petition (R. 13), later followed by an admission from the court that the petitioner had "probably suffered an injustice" (R. 15). The claim of constitutional rights was also specifically raised by the petitioner, and considered by the Supreme Court of Nebraska, in the form of an assignment of errors appearing in your petitioner's brief submitted for showing. At no time during the entire proceedings in the courts of the State of Nebraska has the respondent made a single denial of the Federal questions raised by your petitioner. The claims that were made by your petitioner and denied by the State courts are:

That the District Court of the Eleventh Judicial District of Nebraska, in and for Valley County, denied your petitioner the due process of law and equal protection of the laws guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that:

(a) He was not informed of the nature and cause of the accusation for which he was to answer, nor was he served with a copy thereof;

(b) He was denied the right of counsel together with the accustomed incidents of consultation and preparation for arraignment and trial as provided by law;

(c) He was deprived of a fair, impartial, and deliberate trial by a court of competent jurisdiction;

(d) He did not waive any of the aforesaid constitutional rights, nor does any such waiver appear upon the record, and the deprivation of these constitutional rights by a play upon the ignorance of your petitioner by the trial court and the members thereof flouts the basic principle that all people must stand on an equality before the bar of justice in every American court;

(e) The plea of guilty was likewise made under such circumstances as to render it illegal and insufficient, being entered after false representations had been made to the petitioner by the members of the court.

The following cases, among others, sustain the jurisdiction of the court:

Frank v. *Mangum*, 237 U. S. 309, and *Snyder* v. *Massachusetts*, 291 U. S. 97, established that the failure to include notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to the settled course of judicial proceedings as established by the law of the State, is a denial of due process of law and equal protection of the laws in the sense of the Fourteenth Amendment to the Constitution of the United States.

Powell v. *Alabama*, 287 U. S. 45, established that in a State criminal prosecution the aid and assistance of competent legal counsel, as required by the Sixth Amendment to the Constitution of the United States, is essential to the due process of law required by the Fourteenth Amendment to the Constitution of the United States, and in *Johnson* v. *Zerbst*, 304 U. S. 458, it was stated that the denial of constitutional rights to the accused person deprives the trial court of jurisdiction. See also, *Strauder* v. *West Virginia*, 100 U. S. 303; *Neal* v. *Delaware*, 103 U. S. 370; and *Brown* v. *Mississippi*, 297 U. S. 278, all of which are authority for the view that the duty of maintaining constitutional rights of a person on trial for his life or liberty transcends mere rules of procedure.

Patton v. *United States*, 281 U. S. 276, and *Johnson* v. *Zerbst*, *supra*, are authority for the fact that the express and intelligent consent of the defendant must be had before any waiver can become effective, and that it is the bounden duty of a trial judge to determine whether there is an intelligent and competent waiver, by the accused, of any of

the rights guaranteed by the Constitution of the United States.

Powell v. *Alabama, supra,* and *Grosjean* v. *American Press Co.,* 297 U. S. 233, are authority for the proposition that certain fundamental rights, safeguarded by the first eight amendments to the Constitution of the United States against Federal action, are also safeguarded against State action by the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, "and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution."

Questions Presented.

1. Is an accused deprived of his liberty without due process of law and equal protection of the laws, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, where he was not informed of the nature and cause of the accusation for which he was to answer, and where he was refused the right to be served with a copy of the charge filed against him?

2. Is an accused deprived of his liberty without due process of law and equal protection of the laws, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, where he had no education and was without legal skill or knowledge, and was financially unable to employ counsel, where he was placed on trial and refused the right to the advice and assistance of legal counsel?

3. Is an accused deprived of his liberty without due process of law and equal protection of the laws, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, where he is tried and sentenced, without a conviction showing upon the record, to a term of twenty (20) years imprisonment at hard labor by a court which failed to acquired competent jurisdiction as required by the Constitution and laws of a State?

4. Can it be held to be due process of law and equal protection of the laws under the requirements of the Fourteenth Amendment to the Constitution of the United States where an accused, ignorant and uninstructed by legal counsel, is duped and inveigled by officers of the trial court into entering a plea of guilty to a charge of which he knew nothing because it had been falsely represented to him orally, and does such a plea entered under such circumstances waive all the fundamental rights guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States?

5. Is an accused, tried and sentenced under such circumstances, where the state law provides no other remedial process for the correction of such wrong, entitled to be released upon his petition for *habeas corpus?*

6. Did the Supreme Court of Nebraska err in affirming the judgment of the District Court of Lancaster County wherein it was held that a petition filed by an accused alleging the above circumstances, failed to set out a cause of action for relief by petition for *habeas corpus?*

Reasons Relied On for the Allowance of the Writ.

The final judgment of the Supreme Court of Nebraska, affirming the judgment of the District Court of Lancaster County dismissing the petition for a writ of *habeas corpus,* decided, substantial Federal questions of substance in a way probably not in accord with applicable decisions of this Court, because this final judgment has the effect of contradicting the fact that:

1. The failure of the officers of the trial court to inform the petitioner of the nature and cause of the accusation for which he was to answer, or to serve him with a written copy thereof, and the refusal of the judge of the trial court to cause your petitioner to be so informed and served after

the said judge had been advised of the fact that the nature of the accusation had been maliciously misrepresented to the petitioner orally and that the petitioner had never been informed in any way whatsoever of the actual charge to which he was inveigled into entering a plea of guilty, is a denial to the petitioner herein of the due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. This holding is in direct conflict with the precedents set by this Court in the cases of *Frank* v. *Mangum,* 237 U. S. 309, and *Garland* v. *Washington,* 232 U. S. 642.

2. The refusal of the judge of the trial court to appoint legal counsel upon the petitioner's request so to do, and to give him sufficient time to seasonably and properly consult with and advise your petitioner of his rights in the premises and to adequately represent him in the proceedings therein, is a denial to the petitioner herein of the due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. Such a holding is an offense to the principles of justice determined by this Court in the cases of *Powell* v. *Alabama,* 287 U. S. 45; *Johnson* v. *Zerbst,* 304 U. S. 458; *Brown* v. *Mississippi,* 297 U. S. 278; and *Grosjean* v. *American Press Co.,* 297 U. S. 233, 56 S. Ct. 444 at p. 446.

3. The failure of the trial court to acquire competent jurisdiction by not conducting the business of the court according to the settled course of judicial proceedings as established by the laws of the state is a denial of the due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. This holding is in direct conflict with the opinions of this Court in the cases of *Frank* v. *Mangum, supra;* and *Mooney* v. *Holohan,* 294 U. S. 103.

4. The failure of the judge of the trial court to obtain and record competent, express, and intelligent waivers from your petitioner of the three foregoing constitutional rights of which your petitioner was deprived is a denial of the due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. This holding is in violation of the maxims of law laid down by this Court in the cases of *Patton* v. *United States*, 281 U. S. 276; and *Johnson* v. *Zerbst, supra.*

All of the above questions were seasonably and properly raised by your petitioner in the District Court of Lancaster County by petition for writ of *habeas corpus*, and in the Supreme Court of Nebraska by assignment of error, and the Supreme Court of Nebraska denied the Federal questions involved by affirming the judgment of the court below dismissing the petition for a writ of *habeas corpus*, and it is submitted that this judgment of the Supreme Court of Nebraska is in conflict with the principles of justice as announced by this Court in the cases cited herein, in that it deprives your petitioner of the due process of law and equal protection of the laws guaranted by the Fourteenth Amendment to the Constitution of the United States. Your petitioner has thus exhausted all available remedies provided by the laws of the State of Nebraska and all process available in the courts of the State of Nebraska.

In support of the foregoing grounds of application, your petitioner submits the accompanying brief setting forth in detail the precise facts and arguments applicable thereto.

Wherefore, your petitioner, Albert Smith, prays that this Court, pursuant to the provisions of Section 237b of the United States Judicial Code, as amended February 13, 1925, 43 Stat. 937, issue a Writ of Certiorari to review the judgment of the Supreme Court of Nebraska, affirming the judgment of the District Court of Lancaster County, Ne-

braska, dismissing your petitioner's petition for a writ of *habeas corpus,* as aforesaid.

All of which is respectfully submitted this — day of —, 194–.

ALBERT SMITH, *Petitioner,*
Box 11283, Lancaster,
Via Lincoln, Nebraska.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 364

ALBERT SMITH,

Petitioner,

vs.

JOSEPH O'GRADY, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

ARGUMENT.

I.

The failure of the officers of the Trial Court to notify the petitioner of the nature and cause of the accusation for which he was to answer, or to serve him with a copy thereof in writing, deprived the petitioner of his constitutional rights under the Sixth Amendment to the Constitution of the United States.

The Sixth Amendment to the Constitution of the United States provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

> shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence."

In a like manner, and couched in practically the same language, and certainly with the same meaning, Article I, Section 11 of the Constitution of the State of Nebraska provides that:

> "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

Both of the above and foregoing quotations from the Federal and State Constitutions contain certain fundamental rights, among them being the inherent right of a defendant in a criminal prosecution to know the nature and cause of the accusation for which he is to answer, and to have a copy thereof served upon him. However, because the Constitution of Nebraska is not self-enacting, legislation was necessary to provide a definite manner in which a defendant would be served with a copy of the charge. Such legislation was provided by Chapter 29-1802 of the Compiled Statutes of Nebraska for 1929, wherein it is required that:

> "29-1802. Indictment, Recorded by Clerk of District Court, Copy of Felony Indictment Served on Defendant, Arraignment, When Had. The Clerk of the district court shall, upon the filing of any indictment with him, and after the person indicted is in custody or let to bail, cause the same to be entered of record on the

journal of said court, * * *. Within twenty-four hours after the filing of an indictment for felony, and in every other case on request, THE CLERK SHALL MAKE AND DELIVER TO THE SHERIFF, THE DEFENDANT OR HIS COUNSEL A COPY OF THE INDICTMENT, AND THE SHERIFF ON RECEIVING SUCH COPY SHALL SERVE THE SAME UPON THE DEFENDANT, and no one shall be, without his assent, arraigned or called on to answer to any indictment until one day shall have elapsed after receiving in person or by counsel, or having an opportunity to receive a copy of such indictment as aforesaid." (G. S. p. 821; 1877 p. 4; Ann. 2596; Comp. 8180; R. S. 1913, 9080; C. S. 1922, 10104.) C. S. 1929, p. 732. (Capitals supplied.)

Attached to and made a part of the original petition for a writ of *habeas corpus*, and appearing therein as "Exhibit A", was a certified copy of your petitioner's Information, Judgment, and Sentence as the same appears of record in the office of the Clerk of the District Court of Valley County, Nebraska (R. 6-10). The significant part of that exhibit, insofar as this proposition is concerned, appears on page 9 of the transcript and is herewith quoted for the convenience of the court:

STATE OF NEBRASKA,
County of Valley, ss:

I, — Sheriff in and for Valley County, Nebraska, do hereby certify that on the — day of —, A. D. 19 — in the county aforesaid, I served a true and certified copy of the within information on the herein Defendant — by delivering to him personally a true and certified copy of said information with all endorsements thereon.

Dated at Ord, Nebraska, in said county, this — day of —, A D., 19—.

———,
Sheriff.

The blanks, as your petitioner has shown them in the foregoing quotation of the Sheriff's certification, are exactly as they appear in the certified copy received by your petitioner from the Clerk of the Valley County District Court. Thus, there can be no dispute; it is a fact that your petitioner DID NOT receive a copy of the charge for which he was to answer, and it is therefore also a fact that the provisions of the foregoing Chapter 29-1802 of the Compiled Statutes of Nebraska for 1929, and similar provisions contained in Article I, Section 11 of the Constitution of Nebraska and the Sixth Amendment to the Constitution of the United States, were thereby violated. But fundamental rights of citizens of the United States must not, and shall not, be so violated, as this Court has held many times in the past. A good example upholding this proposition appears in the opinion rendered by this Court in the case of *Snyder* v. *Massachusetts*, 291 U. S. 97, wherein it was held that:

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness UNLESS IN SO DOING IT OFFENDS SOME PRINCIPLE OF JUSTICE SO ROOTED IN THE TRADITIONS AND CONSCIENCE OF OUR PEOPLE AS TO BE RANKED FUNDAMENTAL * * * WHAT MAY NOT BE TAKEN AWAY IS NOTICE OF THE CHARGE AND AN ADEQUATE OPPORTUNITY TO BE HEARD IN DEFENSE OF IT. Twining *v.* New Jersey, 211 U. S. 78, 106, 111, 112; Powell *v.* Alabama, 287 U. S. 45. at pages 68, 71; Holmes *v.* Conway, 241 U. S. 624; Cf. Blackmer *v.* United States, 284 U. S. 421, 440." (Capitals supplied.)

When your petitioner was taken before the District Court of Valley County on September 27, 1932, it was his first experience in all of his 56 years in a criminal courtroom.

Yet, common sense told him that he ought to be notified in some manner of the charge for which he was to answer. Realizing this, your petitioner requested a copy of the charge, not once but many times. But each request was parried with the adroit, suave answer of a professional politician. Even the judge told your petitioner that there was no need for him to have a copy of the charge. Truly, your petitioner was duped; duped into believing the officials of the court were his friends; duped into entering a plea without knowing what he was entering a plea to. The unintelligible language of the courtroom meant little to him, and there is no record of the Valley County District Court to show that the petitioner was informed, in language he could reasonably be expected to understand, of the nature of the accusation for which he was to answer. These facts were all brought out clearly in your petitioner's original petition for a writ of *habeas corpus* (R. 1-9), and the deprivation of this right was raised in the form of a substantial Federal question (R. 4-6), all of which was supported by the aforesaid quotation from the case of *Snyder* v. *Massachusetts, supra,* and an opinion rendered by the Supreme Court of Nebraska in the case of *State* v. *Robertson,* 55 Neb. 41, 75 N. W. 37, wherein it was said at page 38 that:

> "* * * This pleading the statute denominates either an indictment, information, or complaint. A copy of this pleading in felony cases MUST be served upon the accused. It is to this that he must plead, and it is upon the allegations of this pleading that a judgment convicting him of having committed the offense charged must stand or fall." (Capitals supplied.)

But the District Court of Lancaster County would not officially recognize the deprivation of a fundamental constitutional right as being sufficient cause for the issuance

of a writ of *habeas corpus,* and the Supreme Court of Nebraska, in considering the same point brought up as an assignment of error, refused to acknowledge the error and held in favor of the respondent.

Although it has been impossible for your petitioner to make an exhaustive research on this particular question, it seems clear that upon the authority of the *Snyder* case, *supra,* the Sixth Amendment to the Constitution of the United States placed upon the trial court, and all of the members thereof, a duty to insure to petitioner notice and service of a copy of the charge for which he must answer; and, if the excuse be given that this is a State case and the Sixth Amendment should not apply thereto, the case of *State* v. *Robertson, supra,* is sufficient authority to cause Article I, Section 11 of the Constitution of Nebraska to place the same identical duty upon the trial court, and all of the members thereof. Your petitioner's contention is not an idle one. Furthermore it is supported by the records of the trial court. Therefore, it is the duty of this Court to hold that your petitioner was deprived of the right, as provided by the Sixth Amendment to the Constitution of the United States, to be informed of the nature and cause of the accusation for which he was to answer, and to be served with a copy thereof.

II.

The failure of the Trial Court to appoint counsel for the petitioner in the trial of his case deprived the petitioner of his constitutional rights under the Sixth Amendment to the Constitution of the United States.

The Sixth Amendment to the Constitution of the United States provides, among other things, that "In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defence." Substantially the same right is also provided by Article I, Section

11 of the Constitution of Nebraska, *supra,* which is rendered operative by Chapter 29-1803 of the Compiled Statutes of Nebraska for 1929, wherein it is provided that:

> "29-1803. Court Assign Counsel for Accused, When, Counsel Fees Audited and Allowed by Court, Public Defender. The court before whom any person shall be indicted for any offense which is capital, or punished by imprisonment in the penitentiary, IS HEREBY AUTHORIZED AND REQUIRED TO ASSIGN TO SUCH PERSON COUNSEL NOT EXCEEDING TWO, IF THE PRISONER HAS NOT THE ABILITY TO PROCURE COUNSEL, and they shall have full access to the prisoner at all reasonable hours; * * *." (G. S. p. 821; Ann. 2597; Comp. 8181; R. S. 1913, 9081; 1915 p. 336; 1917 p. 335; 1919 p. 163; C. S. 1922, 10105). C. S. 1929, pp. 732, 733. (Capitals supplied.)

The above quoted statute of Nebraska is mandatory in its nature and is necessary because of the requirements of Article I, Section 11 of the Constitution of Nebraska and the Sixth Amendment to the Constitution of the United States. And, in view of the past holdings of this Court on the question of counsel for the defendant in a criminal action, the question of law raised by your petitioner in this proposition cannot be lightly brushed aside, as was done by the Supreme Court of Nebraska.

Bewildered and alone in a criminal court for the first time in his 56 years, and with the persistent feeling that something was amiss, your petitioner requested the appointment of counsel to advise and assist him in his defense. This request was made both BEFORE and AFTER a plea was entered, and each request was refused by the trial court. It is your petitioner's contention that these refusals deprived him of the fundamental right to counsel guaranteed by the Sixth Amendment to the Constitution of the United States. This Court laid great stress on the neces-

sity of this fundamental right in the case of *Powell* v. *Alabama,* 287 U. S. 45, wherein it was stated, at pages 68 and 69, that the:

> "* * * right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him."

In the *Powell* case, *supra,* the accused was represented by counsel, but this Court held that he had not been represented by COMPETENT counsel and that he had thus been denied the right provided by the Sixth Amendment to the Constitution of the United States. But in the instant case your petitioner was refused the assistance of all counsel, competent or otherwise. Despotic methods such as this were frowned upon by this Court when, in rendering the opinion in the case of *Brown* v. *Mississippi,* 297 U. S. 278, it was stated that:

> "The State may not deny to the accused the aid of counsel. Powell *v.* Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527."

The importance of safeguarding the fundamental right to counsel was also stressed, together with other fundamental rights guaranteed by the first eight amendments to the Constitution of the United States, in the opinion rendered by

this Court in the case of *Grosjean* v. *American Press Co.*, 297 U. S. 233, 56 S. Ct. 444, at page 446.

Then, in the more recent case of *Johnson* v. *Zerbst*, 304 U. S. 458, this Court held that:

> "The PATTON case noted approvingly a State court decision (Hack *v.* State, 141 Wisconsin 346, 351) pointing out that the humane policy of modern criminal law had altered conditions which had existed in the 'days when the accused could not testify in his own behalf, (and) was not furnished Counsel,' and which had made it possible to convict a man when he was 'without money, without counsel, without ability to summon witnesses and not permitted to tell his own story, * * *. * * * The constitutional right (the Sixth Amendment) of an accused to be represented by Counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel."

After diligent research your petitioner has come to the conclusion that there is no "State court decision" of the State of Nebraska which this Court could note "approvingly" on this particular subject, but that is all the more reason why this Court should uphold the petitioner's contention on the vital Federal question. Clearly, the District Court of Lancaster County erred when it held that the refusal of the assistance of counsel, as provided by the Sixth Amendment to the Constitution of the United States, was not sufficient cause for the issuance of a writ of *habeas corpus*, and just as clearly, the Supreme Court of Nebraska erred in a like manner when it upheld the judgment of the District Court of Lancaster County. Because of these facts, and by authority of the opinions rendered by this Court and cited and quoted herein, it is the duty of this Court to declare that your petitioner was deprived of the right to be represented by counsel, as aforesaid.

III.

The failure of the trial court to acquire competent jurisdiction before proceeding with the petitioner's case deprived the petitioner of his constitutional rights under the Fourteenth Amendment to the Constitution of the United States.

The Fourteenth Amendment to the Constitution of the United States provides that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Here again the petitioner has raised an important Federal question, a question involving due process of law and equal protection of the laws. In the instant case, as the record shows (R. 6-10), the petitioner was charged, tried, sentenced, and committed to the penitentary within a period of about eight hours. This, your petitioner contends, is a violation of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States because it is a denial of the equal protection of the laws of Nebraska as guaranteed by that same amendment to the Constitution of the United States. The violation as contended by the petitioner was as follows.

Chapter 27-317 of the Compiled Statutes of Nebraska for 1929 provides as follows, insofar as it is related to the instant case:

> "27-317. District Judge, Jurisdiction in Chambers. A judge of the district court may sit at chambers any-

where within his district and upon ten days' notice to the adverse party or his attorney of record, shall have power to: * * * Tenth. Receive a plea of 'guilty' from any person charged with a felony and pass sentence thereon, upon ten days' notice to the prosecuting attorney. * * *." (1879 p. 90; 1913 p. 635; Ann. 4749; Comp. 2731; R. S. 1913, 1176; 1921 p. 676; C. S. 1922, 1099). C. S. 1929, p. 641.

There can be no doubt or dispute as to the meaning of this statute, Chapter 27-317, *supra*. A judge of the district court in the State of Nebraska MUST give at least a ten days' notice to the defendant or his attorney, and to the county attorney, that he will accept a plea of guilty in chambers. Then, and only then, does the court acquire jurisdiction so to do, and, AFTER the ten days have passed, the court may then accept the plea of guilty. But, it will be said, in the instant case the plea of guilty was made in open court. It is true that the record (R. 7) does say that your petitioner was "present in person in Open Court," but this one particular phrase in the record does not state the truth. If Open Court can be held in a room less than twelve feet square, containing a small desk, bookshelves, and other appurtenances ordinarily found in and connected with a private office, then it is quite possible that your petitioner was tried in Open Court. But, if this be true, then your petitioner still contends that he was not accorded the equal protection of the laws as required by the Fourteenth Amendment to the Federal Constitution, and because of the following reasons.

If the plea was made by the defendant, the petitioner herein, in open court, then it was made unlawfully because there is no statute of the State of Nebraska, other than Chapter 27-317, *supra*, which gives a district court of the State of Nebraska jurisdiction to accept a plea of guilty in a criminal case. Of course this statement will be disputed by the counsel for the respondent, and it is quite possible

that reference will be made to Chapter 27-302 of the Compiled Statutes of Nebraska for 1929 wherein a general jurisdiction is conferred upon district courts, but that same statute also makes an exception, as follows:

> "27-302. District Judge, Jurisdiction. The district courts shall have and exercise general, original and appellate jurisdiction in all matters, both civil and criminal, EXCEPT WHERE OTHERWISE PROVIDED." (1879 p. 87; Ann. 4734; Comp. 2716; R. S. 1913, 1161; C. S. 1922, 1084.) C. S. 1929, p. 639. (Capitals supplied.)

In view of the fact that Chapter 27-317, *supra,* does specifically provide HOW AND WHEN a plea of guilty made by a defendant may be accepted by the judge of a district court, and, in view of the fact that Chapter 27-302, *supra,* does provide general jurisdiction EXCEPT WHERE OTHERWISE PROVIDED, the petitioner's argument herein cannot be logically disputed. It has been OTHERWISE PROVIDED that, when and if a judge of a district court of Nebraska shall fulfill certain rigid requirements, he may then, but not until then, accept a plea of guilty in a criminal case. It is not logical to try to interpret these two Nebraska statutes in any other manner, because to do so would be to say that, if a judge of a district court should happen to be in one particular part of a courthouse he could accept a plea of guilty the instant it was made, but, on the other hand, if he should happen to be in another part of the same courthouse he would have to give a ten days' notice to the defendant that he intended to accept the plea. Such reasoning is not logical, but it is the only reasoning possible if your petitioner's interpretation is not accepted.

Likewise, it cannot be said that there is a confliction between these two statutes, because if such were the case, the final analysis of this jurisdictional question involving

the equal protection of the laws would have to resolve in favor of the petitioner.

That a court of a state MUST proceed in a criminal prosecution in the manner prescribed by law has been an accepted fact since the early history of this nation, for this Court held, in the case *of Ex parte Bollinan,* 4 Cranch. 93, that:

> "Courts which are created by written law and whose jurisdiction is defined by written law cannot transcend that jurisdiction."

This doctrine has been followed religiously in most instances, as can be demonstrated by a recent opinion of the Supreme Court of the State of Wisconsin, wherein it was held, in the case of *State ex rel. Lang* v. *Civil Court of Milwaukee County,* 280 N. W. 347 at page 349, that:

> "It is true, as respondents argue, that as the proceeding is statutory in its origin, the legislature was authorized to and did fix the issues and the manner in which they should be tried (*Francken* v. *State,* 190 Wis. 424, 209 N. W. 766); THAT STATUTORY POWERS CONFERRED UPON A COURT OF INFERIOR JURISDICTION MUST BE EXERCISED AND EXECUTED IN SUBSTANTIALLY THE MANNER PRESCRIBED BY THE STATUTE, OR THE JUDGMENT WILL BE VOID (33 C. J. p. 1064); AND THAT, ALTHOUGH A COURT MAY HAVE HAD JURISDICTION OF SUCH AN ACTION, IT MAY LOSE IT AND DO ACTS THEREIN WITHOUT THE AUTHORITY OF THE LAW WHICH WILL THEN BE VOID FOR WANT OF JURISDICTION (*Two Rivers Mfg. Co.* v. *Beyer et al.,* 74 Wis. 210, 42 N. W. 232, 17 Am. St. Rep. 131)." (Capitals supplied.)

This Court has literally demanded that this doctrine be observed, for it was held, in the cases of *Frank V. Mangum,* 237 U. S. 309, and *Johnson* v. *Zerbst,* 304 U. S. 458, that a

court's jurisdiction may be lost "in the course of proceedings", and this Court even outlined a few of the many ways that jurisdiction could be lost "in the course of proceedings." But in the instant case, the District Court of Valley County, Nebraska, did not have any jurisdiction to lose because jurisdiction, "created by written law," was never acquired in accordance with the provisions of that written law. Furthermore, the JOURNAL ENTRY of the trial court (R. 7) clearly shows that your petitioner's plea of guilty was not accepted, because the acceptance thereof was not recorded. The Legislature of Nebraska has provided but one jurisdiction for the acceptance of a plea of guilty in felony cases, and the trial court, realizing this fact, and also realizing that the requirements of that jurisdiction had not been complied with, failed to enter the acceptance in the record. Thus, your petitioner was tried and sentenced by a court of incompetent jurisdiction, without being convicted, and because of this fact the Supreme Court of Nebraska erred when it affirmed the judgment of the District Court of Lancaster County, wherein it was held that the deprivation of your petitioner's right to a trial by a court of competent jurisdiction was not a denial of the equal protection and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. There can be no dispute of the fact that your petitioner was deprived of the right to be tried by a court of competent jurisdiction, as aforesaid, and it is the duty of this Court to so hold.

IV.

The failure of the Trial Court to obtain and record express and intelligent waivers from the petitioner indicates that no waivers were made, and a plea of guilty is not necessarily a judicial confession of guilt, nor does a plea of guilty waive the fundamental rights guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

The Sixth and Fourteenth Amendments to the Constitution of the United States provide certain fundamental rights of which no person residing in the jurisdiction of the United States may be deprived in the course of a criminal prosecution, among them being the defendant's right to know the nature and cause of the accusation for which he is to answer and to be served with a copy thereof, the right to the aid of competent legal counsel, and the right to a fair and impartial trial before a court of competent jurisdiction. Of these three rights, this Court has held that only the aid of legal counsel may be waived, and then only when the waiver was of an express and intelligent nature. It has also been held by this Court that such waivers, if they are made, should be properly recorded by the trial court. In the instant case, the JOURNAL ENTRY of the trial court (R. 7) shows that only one waiver was made by your petitioner, that being the waiver of the right to preliminary examination. In the foregoing arguments your petitioner has contended that he was deprived of the three fundamental rights named above. Your petitioner further declares, and the record does not dispute it, that he did not INTENTIONALLY, INTELLIGENTLY OR EXPRESSLY WAIVE ANY OF THESE RIGHTS. In spite of this fact, the Supreme Court of Nebraska, in affirming the judgment of the District Court

of Lancaster County, literally held that your petitioner had waived his right to be informed of the nature and cause of the accusation and to be served with a copy thereof, his right to the aid of counsel, and his right to be tried by a court of competent jurisdiction. Clearly, the Supreme Court of Nebraska is in error, because this Court held, in the case of *Johnson* v. *Zerbst,* 304 U. S. 458, that:

> "The constitutional right of an accused to be represented by Counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without Counsel. THIS PROTECTING DUTY IMPOSES THE SERIOUS AND WEIGHTY RESPONSIBILITY UPON THE TRIAL JUDGE OF DETERMINING WHETHER THERE IS AN INTELLIGENT AND COMPETENT WAIVER BY THE ACCUSED. WHILE AN ACCUSED MAY WAIVE THE RIGHT TO COUNSEL, WHETHER THERE IS A PROPER WAIVER SHOULD BE CLEARLY DETERMINED BY THE TRIAL COURT, AND IT WOULD BE FITTING AND APPROPRIATE FOR THAT DETERMINATION TO APPEAR UPON THE RECORD.' (Capitals supplied.)

Cf. Patton v. *United States,* 281 U. S. 276.

It has been said by the Supreme Court of Nebraska that a person charged with crime may, by a plea of guilty, waive all the rights secured to him by Article I, Section 11, of the Constitution of Nebraska, *supra.* The fact that the Supreme Court of Nebraska neglected to include those rights guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States is glaringly apparent by their very absence. It is respectfully submitted that a plea of guilty to a criminal charge DOES NOT constitute a waiver to any of the fundamental constitutional guaranties of the Sixth and Fourteenth Amendments to the Con-

stitution of the United States, because this Court held, in the case of *Johnson* v. *Zerbst, supra,* that:

> "The purpose of the constitutional guaranty of the right to Counsel is to protect an accused from conviction resulting from ihs own ignorance of his legal and constitutional rights, AND THE GUARANTY WOULD BE NULLIFIED BY A DETERMINATION THAT AN ACCUSED'S IGNORANT FAILURE TO CLAIM HIS RIGHTS REMOVES THE PROTECTION OF THE CONSTITUTION." (Capitals supplied.)

Such a determination by this Court automatically nullified all opinions of the Supreme Court of Nebraska wherein it was held that a plea of guilty waives all rights secured to a defendant by Article I, Section 11, of the Constitution of Nebraska, because those same rights included in Article I, Section 11, of the Nebraska Constitution are also guaranteed by the Sixth Amendment to the Constitution of the United States. Likewise, an accused could be ignorant of, and thus fail to claim, his rights before entering a plea of guilty; but, by the very wording of this quotation from the *Johnson* case, *supra,* such an ignorant act would not nullify the guaranties of the right to counsel, of the right to be notified of the nature and cause of the accusation, or of the right to a trial by a court of competent jurisdiction.

However, even though your petitioner was, and still is, ignorant of law and legal procedure, HE VERY DEFINITELY DID REQUEST A COPY OF THE CHARGE FOR WHICH HE WAS TO ANSWER, AND THE ADVICE AND ASSISTANCE OF LEGAL COUNSEL, BOTH BEFORE AND AFTER HE ENTERED HIS PLEA OF GUILTY, AND BOTH OF THESE REQUESTS WERE REFUSED BY THE TRIAL COURT. It cannot be said, therefore, that he waived these rights. As for the third right claimed by your petitioner, it is a well known

fact that it is impossible for a defendant, by any plea or consent on his part, either express or inferential, to waive the jurisdiction of the court. This matter is well covered by the following:

> "The objection that a court has no jurisdiction of the subject matter is not waived by plea or by going to trial, and may be raised on motion in arrest of judgment, on appeal, or by petition for a writ of *habeas corpus.*" 16 C. J. 184, Section 257;
>
> *Hager* v. *Falk,* 82 Wis. 644, 52 N. W. 432.

The three rights claimed herein by your petitioner, namely, the right to notice and service of the charge, the right to counsel, and the right to trial by a court of competent jurisdiction, have all been classified by this Court, at one time or another, as fundamental rights. Mr. Cooley, in Constitutional Limitations (Page 182), says:

> "A party may consent to waive rights of property, but the trial and punishment for public offenses are not within the province of individual consent or agreement."

This means that, by individual consent or agreement, fundamental rights cannot be waived. Likewise, in Hawes on Jurisdiction, Sections 11 and 12, it is said that "A party cannot waive a constitutional right when its effect is to give a court jurisdiction," and precisely the same ruling was made by this Court in the case of *Ex parte Bain,* 121 U. S. 1.

The record (R. 7) shows that the rights claimed herein were not waived, and it is so claimed by your petitioner. Therefore, it must be held, it is submitted, that your petitioner did not expressly nor intelligently waive his right to notice and service of the charge, his right to the assistance of counsel, or his right to trial by a court of competent jurisdiction—all of which are rights secured by the

Sixth and Fourteenth Amendments to the Constitution of the United States—by his ignorant plea of guilty to a charge the nature and cause of which he knew nothing. Equal protection of the laws and due process of law cannot be ignorantly waived, and the deprivation of these rights without a waiver is an important Federal question that this Court must decide in favor of the petitioner by reversing the judgment of the Supreme Court of Nebraska.

V.

The trial, conviction without finding of guilt, sentence, and imprisonment of the petitioner under the circumstances disclosed herein deprived the petitioner of his liberty without the equal protection and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Your petitioner has shown beyond any possible doubt (1) that he was deprived of his constitutional right to know the nature and cause of the charge for which he was to answer and to be served with a copy thereof, (2) that he was deprived of his constitutional right to the aid of competent legal counsel, and (3) that he was deprived of his constitutional right to a trial by a court of competent jurisdiction. It has been further shown by the petitioner that he did not, either expressly, intelligently, nor in any other manner, waive any of these fundamental constitutional rights, each of which is provided by the Sixth Amendment to the Constitution of the United States. It is the contention of your petitioner that the deprivation of the foregoing rights deprived him of his liberty without the equal protection and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The requirements of "due process of law" and "equal protection of the laws", as these two phrases appear in

Section 1 of the Fourteenth Amendment to the Constitution of the United States, are best defined in a general manner in the opinion rendered by this Court in the case of *Duncan* v. *Missouri*, 152 U. S. 377, wherein it is said, at page 382, that:

> "Due process of law and the equal protection of the laws are secured only when the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government', citing State *v.* Guerringer, 265 Mo. 408; Hopt *v.* Utah, 110 U. S. 574."

The individual could be subjected to the "arbitrary exercise of the powers of government" in many ways, but in the instant case the District Court of Valley County, representing the judicial branch of the government of the State of Nebraska, vented an arbitrary exercise of its power over your petitioner by depriving him of three fundamental rights guaranteed by the Constitution of the United States. In the case of *DeJonge* v. *Oregon*, 299 U. S. 353, Mr. Chief Justice Hughes said that:

> "A conviction under a criminal charge not made is a denial of due process."

Can it be said, under the circumstances related herein and verified by the records of this case, that a criminal charge was made? Is a criminal charge made if notice and service of same are not made upon the defendant? The best general expression of this principle stated in the *DeJonge* case, *supra*, is found in the opinion rendered by this Court in the case of *Powell* v. *Alabama*, 287 U. S. 45, wherein it is stated at pages 68 and 71 that:

> "It has never been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the

> case, constitute basic elements of the constitutional requirements of due process of law. The words of Webster, so often quoted, that by the law of the land is intended 'a law which hears before it condemns,' have been repeated in varying forms of expression in a multitude of decisions. In Holden *v.* Hardy, 169 U. S. 366, 389, 42 L. Ed. 780, 18 S. Ct. 383, the necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard' and Mr. Justice Field, in an earlier case, Galpin *v.* Page, 18 Wall. 350, 368, 369, 21 L. Ed. 959, 963, 964, said, that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' "

This Court also upheld these same "immutable principles of justice", and especially the right of the defendant to notice and service of the charge, in the cases of *Rogers* v. *Peck*, 199 U. S. 425, 435, and *Garland* v. *Washington*, 232 U. S. 642 at page 645.

And again, in the case of *Powell* v. *Alabama, supra,* at page 68 therein, this Court held that in a proper case:

> "The aid of counsel is essential to due process."

It must be held, it is submitted, that the instant case is a proper case, because if your petitioner had had the advice of counsel he would not have entered a plea to a charge of which he knew nothing, and had he known the nature of the charge, the plea of guilty would not have been entered. It cannot be said, nor is it supported by the JOURNAL ENTRY (R. 7) or any of the other records

of the trial court (R. 6-10), that your petitioner knew or understood the natural effects of his plea of guilty.

It will probably be said by the learned counsel for the respondent, as it has already been said by the same counsel in opposition briefs recently filed with this Court in the cases of *Thompson* v. *O'Grady,* No. 84, October Term, 1940, and *Alexander* v. *O'Grady,* No. 126, October Term, 1940, that "It is elementary learning that the Sixth Amendment to the Constitution of the United States does not guarantee procedure in criminal prosecutions in courts of the several states." It is respectfully submitted that such a statement will not "hold water" in this Court for the very reason that it is contrary to the precepts of justice as interpreted in the many opinions cited herein. This is especially true in the case of *Grosjean* v. *American Press Co.,* 297 U. S. 233, 56 S. Ct. 444, wherein it was alleged that the freedom of the press, as provided by the First Amendment to the Constitution of the United States, had been abridged in contravention of the due process clause in Section 1 of the Fourteenth Amendment to the Constitution of the United States. Although the Grosjean case, *supra,* came up to this Court by process of direct appeal, and, although the case involved the deprivation of civil rights, the opinion rendered by this Court left no doubt of the fact that certain fundamental rights, safeguarded by the first eight amendments to the Constitution of the United States against federal action, were also safeguarded against state action, in both civil and criminal cases, by the due process of law clause of the Fourteenth Amendment to the Constitution of the United States. This fact was brought out clearly, together with the reasons of this Court for so holding, when it was stated, at page 446 of the Supreme Court Reporter, that:

> "In the case of Hurtado *v.* California, 110 U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232, this court held that the

term 'due process of law' does not require presentment or indictment by a grand jury as a prerequisite to prosecution by a state for a criminal offense. And the important point of that conclusion here is that it was deduced from the fact that the Fifth Amendment, which contains the due process of law clause in its national aspect, also required an indictment as a prerequisite to a prosecution for crime under federal law; and it was thought that since no part of the amendment could be regarded as superfluous, the term 'due process of law' did not, *ex vi termini,* include presentment or indictment by a grand jury in any case; and that the due process of law clause of the Fourteenth Amendment should be interpreted as having been used in the same sense, and as having no greater extent. BUT IN POWELL *V.* STATE OF ALABAMA, 287 U. S. 45, 65, 68, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527, WE HELD THAT IN THE LIGHT OF SUBSEQUENT DECISIONS THE SWEEPING LANGUAGE OF THE HURTADO CASE COULD NOT BE ACCEPTED WITHOUT QUALIFICATION. WE CONCLUDED THAT CERTAIN FUNDAMENTAL RIGHTS, SAFEGUARDED BY THE FIRST EIGHT AMENDMENTS AGAINST FEDERAL ACTION, WERE ALSO SAFEGUARDED AGAINST STATE ACTION BY THE DUE PROCESS OF LAW CLAUSE OF THE FOURTEENTH AMENDMENT, AND AMONG THEM THE FUNDAMENTAL RIGHT OF THE ACCUSED TO THE AID OF COUNSEL IN A CRIMINAL PROSECUTION." (Capitals supplied.)

Because of the foregoing opinion of this Court in the Grosjean case, *supra,* there can be no dispute of the fact that your petitioner's right to notice and service of the charge, his right to the aid of competent legal counsel, and his right to trial by a court of competent jurisdiction are all secured by the Sixth Amendment to the Constitution of the United States. Likewise, there can be no doubt but that the denial of these rights violated those "fundamental

principles of liberty and justice which lie at the base of all our civil and political institutions'' (*Hebert* v. *Louisiana,* 272 U. S. 312) and which, being embodied in the concept ''due process of law''; are protected against hostile state invasion by the due process clause of the Fourteenth Amendment to the Constitution of the United States, citing:

Nielsen, Petitioner, 131 U. S. 176;
Frank v. *Mangum,* 237 U. S. 309;
Brown v. *Mississippi,* 297 U. S. 278.

Because of the above and foregoing reasons it must be held, it is submitted, that your petitioner has been deprived of his liberty without the equal protection and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

VI.

The petitioner's imprisonment in violation of the rights secured to him by the Sixth Amendment to the Constitution of the United States, and guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, is a nullity and he is entitled to be released upon his writ of habeas corpus.

Assuming that your petitioner has been deprived of his constitutional rights, as has been conclusively shown in the preceding arguments, the question still remains whether this abuse can be corrected by *habeas corpus.* The District Court of Lancaster County was troubled by this question, and, in fact, dismissed the petition for a writ of *habeas corpus* on the assumption that the deprivation of constitutional rights was not sufficient cause for the issuance of such a writ, and advised, instead, that such a deprivation should be corrected by the Board of Pardons of the State of Ne-

braska (R. 14-15). Likewise, because of the nature of the contents of the order rendered on May 20, 1940 (R. 33), and because of the final judgment rendered on June 3, 1940 (R. 34), it is quite evident that the Supreme Court of Nebraska also has the same arrogant disregard for the rights guaranteed to a defendant in a criminal action by the Sixth and Fourteenth Amendments to the Constitution of the United States. Plainly, the aforesaid order and judgment of the Supreme Court of Nebraska completely destroy the substance of the right to notice and service of the charge, the right to counsel, and the right to trial by a court of competent jurisdiction.

The questions here presented are not questions of mere error in the course of proceedings in the trial court, but are questions of whether a judgment entered in a criminal trial conducted in violation of the requirements of due process of law and equal protection of the laws, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, is such that it is void and may be questioned collaterally. It is respectfully submitted that these precise questions have been answered in the affirmative many times by this Court.

Where circumstances surrounding the trial take from it the essential elements necessary to constitute a hearing such as is demanded by due process, this Court has not hesitated to entertain a collateral attack. Thus, in *Moore* v. *Dempsey,* 261 U. S. 86, where the pressure of a riotous mob turned the trial into a mere sham, and in *Mooney* v. *Holohan,* 294 U. S. 103, where the deception of court and jury by the intentional use of perjured testimony was held to make of the trial a mere pretense, this Court held that the accused could question the cause for his detention through *habeas corpus* proceedings. In neither of these cases did this Court decline to entertain the petition on the ground that by so doing the writ would be used as a substitute for a writ of

error, although in both cases it is unquestioned that at the time of the original trial, the trial court had jurisdiction of the accused and of the subject matter. The trial court in both cases lost jurisdiction when circumstances arose that turned the trial into a mere pretense. And so it was in the instant case when your petitioner, Albert Smith, was arraigned for plea without counsel to advise him, on a charge the nature and cause of which he had never been notified, before a court that had failed to acquire competent jurisdiction. The trial court did not have jurisdiction to entertain, nor did it pass upon, your petitioner's plea of guilty; neither did it have jurisdiction to pass judgment or sentence upon your petitioner. Such actions were completely void. As was said by this Court in the case of *Hans Nielsen, Petitioner,* 131 U. S. 176,

> "It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights, than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but, in the other, it has no authority to render judgment against the defendant. This was the case in Ex parte Lange, where the Court had authority to hear and determine the case, but we held that it had no authority to give the judgment it did. It was the same in the case of Snow: The Court had authority over the case, but we held that it had no authority to give judgment against the prisoner. HE WAS PROTECTED BY A CONSTITUTIONAL PROVISION, SECURING TO HIM A FUNDAMENTAL RIGHT. IT WAS NOT A CASE OF MERE ERROR IN LAW, BUT A CASE OF DENYING TO A PERSON A CONSTITUTIONAL RIGHT. AND WHERE SUCH A CASE APPEARS ON THE RECORD, THE PARTY IS ENTITLED TO BE DISCHARGED FROM IMPRISONMENT." (Capitals supplied.)

The Supreme Court of Nebraska has, in the past, rendered a few decisions upholding a collateral attack upon a void judgment, one of the most representative being the opinion rendered in the case of *Ex parte Resler,* 115 Neb. 335, 212 N. W. 765, wherein it was held that:

> "It is firmly established that if a court or a judge thereof which renders a judgment, or who enters an order, has no jurisdiction of the act done, either because the proceedings or the law under which it is taken is unconstitutional, OR FOR ANY OTHER REASON THE JUDGMENT IS VOID, IT MAY BE QUESTIONED COLLATERALLY, AND A DEFENDANT WHO IS IMPRISONED UNDER AND BY VIRTUE OF IT MAY BE DISCHARGED." (Capitals supplied.)

But it is quite apparent that the opinion of the Supreme Court of Nebraska in the *Resler* case, *supra,* IS NOT RULING CASE LAW IN THE STATE OF NEBRASKA. If it was, this action to this Court would not be necessary.

Neither this Court, nor the respondent herein, can truthfully make a statement similar to that made by this Court in the case of *Mooney* v. *Holohan,* 294 U. S. 103, wherein it was said that:

> "We are not satisfied, however, that the state of California has failed to provide such corrective process. The prerogative writ of *habeas corpus is* available in that state. * * * Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution (of the United States). *Robb v. Connally,* 111 U. S. 624, 637, 4 S. Ct. 544, 28 L Ed. 542. In view of the dominant requirement of the Fourteenth Amendment, we are not at liberty to assume that the state has denied to its court jurisdiction to redress the prohibited wrong upon a proper showing and in an appropriate proceeding for that purpose."

It is true that the State of Nebraska has not denied to its courts jurisdiction to redress a prohibited wrong by *habeas corpus,* and it is also true that such a prerogative writ is available by law in the State of Nebraska. However, an exhaustive research by your petitioner, supported by the records in the instant case, discloses the fact that the deprivation of a right secured to a defendant in a criminal prosecution by the Sixth Amendment to the Constitution of the United States is generally considered by the courts of the State of Nebraska to be mere error. Because of this fact, there are apparently no prohibited wrongs in the State of Nebraska. Furthermore, if the petitioner in a *habeas corpus* action be a pauper who is unable to retain counsel or pay for printed briefs, he cannot have his case heard in the courts of the State of Nebraska, no matter to what extent his constitutional rights may have been violated (R. 13, 13-21, 28-33, 34). In addition to this, the procedure of CORAM NOBIS has been abolished by law in the State of Nebraska, and the Board of Pardons of the State of Nebraska is confined to considering the propriety of extending executive clemency (R. 17) which it declined to do in the instant case. At the time of your petitioner's commitment to the penitentiary, he was ignorant of his right to appeal, and, even had he known of this right, his lack of funds to hire counsel or to pay the cost of an appeal would have been stumbling blocks that he could not have overcome. Because of these facts, your petitioner has exhausted all of his rights in the State of Nebraska and no other procedural remedy remains EXCEPT THE WRIT OF HABEAS CORPUS. In the case of *Johnson* v. *Zerbst,* 304 U. S. 458, 58 S. Ct. 1019, conditions similar to these outlined by your petitioner existed and were depriving the petitioner Johnson of his rights. Mr. Justice Black, in speaking for the Court, said:

> "If these contentions be true in fact, it necessarily follows that no legal procedural remedy is available to grant relief for a violation of constitutional rights, unless the courts protect petitioner's rights by HABEAS CORPUS. Of the contention that the law provides no effective remedy for such a deprivation of rights affecting life and liberty it may well be said —as in Mooney *v.* Holohan, 294 U. S. 103, 113,—that it 'falls with the premise.' To deprive a citizen of his only effective remedy would not only be contrary to the 'rudimentary demands of justice' (Mooney *v.* Holohan, supra, 112) but destructive of a constitutional guaranty specifically designed to prevent injustice."

This Court should not be troubled as to the legitimacy of a collateral attack in the instant case. It has been proven beyond all possible doubt that the judgment and sentence are wholly void for want of the essential elements of due process of law, and the proceeding thus vitiated could be challenged in any appropriate manner. *Mooney* v. *Holohan, supra.* It was challenged in both the District and Supreme Courts of the State of Nebraska by the express invocation of the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of Nebraska entertained the challenge, considered the Federal questions thus presented, found no error in the judgment of the lower court, and declined to enforce your petitioner's constitutional rights. The Supreme Court of the State of Nebraska thus denied Federal questions fully established and specially set up and claimed, and its judgment must therefore be reversed, citing:

Johnson v. *Zerbst,* 304 U. S. 458;
Herndon v. *Lowry,* 301 U. S. 42;
Moore v. *Dempsey,* 261 U. S. 86, 91;
In re Medley, 134 U. S. 160.

Conclusion.

Equal protection and due process under the law are the pillars upon which our democracy rests. A denial of these fundamental rights to any citizen of the United States is a threat to the liberties of all. Liberty must be taken only in accordance with those established modes of procedure which have been tried and tested by time. If the experience of our centuries of the common law has demonstrated that trial and conviction by a court of competent jurisdiction, where the defendant has been properly notified and served with a copy of the charge for which he is to answer and is appropriately represented and advised by competent legal counsel, is better than and preferable to a plea of guilty obtained by deceit in a trial by ordeal and mobocracy, then it is respectfully submitted that the questions raised in this petition call for the exercise by this Court of its supervisory powers to the end that rights guaranteed under the Constitution of the United States and recognized by all civilized nations shall be preserved.

Respectfully submitted,

ALBERT SMITH,
Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 364

ALBERT SMITH,

Petitioner,

vs.

JOSEPH O'GRADY, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

PETITIONER'S BRIEF IN REPLY TO RESISTANCE TO APPLICATION FOR WRIT OF CERTIORARI

ALBERT SMITH,
Pro Se.

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PETITIONER'S BRIEF IN REPLY TO RESISTANCE TO APPLICATION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

By authority of Rule 38, Paragraph 4 (a) of the Revised Rules of this Court effective February 27, 1939, your petitioner respectfully presents this REPLY BRIEF in response to the RESPONDENT'S BRIEF IN RESISTANCE TO APPLICATION OF PETITIONER FOR WRIT OF CERTIORARI filed herein, on the face of which it appears that:

1.

The respondent herein has made every effort possible to confuse and mislead this Court.

On page 2 of his brief the respondent stated that the "Petitioner is merely seeking another hearing in this court

which is obviously for the purpose of rehearing only." Petitioner wishes to respectfully point out to this Honorable Court that he has not yet had a first hearing, and that in the courts of the State of Nebraska he did not even have impartial consideration of his case.

Then, in Point F of his brief, on pages 14, 21, 26, and 27 therein, the respondent cited four contentions which he alleges were made by the petitioner, all of which were reconstructed in such a manner as to make it appear to this Court that your petitioner alleged the deprivation of rights provided only by the Constitution and Statutes of the State of Nebraska. An examination of the petitioner's original petition and supporting brief will disprove this effort of the respondent, because such an examination will disclose that only Federal questions of substance were raised by the petitioner in his petition for a writ of certiorari, and that each question is supported by either the Sixth or Fourteenth Amendments to the Constitution of the United States, or both.

2.

The respondent herein has totally failed to disprove a single one of the contentions made by the petitioner in his petition for a writ of certiorari.

On page 19 of his brief, the respondent stated that: "Respondent cannot resist the temptation to suggest that petitioner must do more than rely upon a 'causual' (casual) remark in an unrelated case if he hopes to prevail in his present contention", yet throughout his entire brief the respondent himself relies upon remarks that could be classified as casual, if his suggestion is to be accepted at face value. For example, in an effort to side step the true circumstances under which youf petitioner was practically forced to enter a plea of guilty, respondent quoted syllabi from opinions rendered by this Court and the Supreme

Court of Nebraska, neither of which will apply, by any stretch of the imagination, to the instant case. Starting on the bottom of page 16 of his brief, the respondent stated, in reference to the petitioner's plea of guilty, that:

> "Indeed, in the latter case, the Supreme Court of Nebraska has repeatedly held that:
>
> "'A person charged with crime may, by a judicial confession of guilt, waive all the rights secured to him by Section 11, Article I of the Constitution (of Nebraska).' McCarty *v.* Hopkins, 61 Neb. 550, 85 N. W. 540; Alexander *v.* O'Grady, 290 N. W. 718; Davis *v.* O'Grady, 291 N. W. 82.
>
> "With respect to the corresponding guarantees in the Sixth Amendment to the Federal Constitution, this court has expressed itself as follows:
>
> > "'A plea of guilty to an indictment, whatever may be the grade of the crime, will be received and acted upon if it is made clearly to appear that the natural effects of it are understood by the accused.' Patton *v.* U. S., 281 U. S. 276, 74 L. Ed. 854, 50 S. Ct. 253.
>
> "Counsel for respondent do not understand this court to have implied in the above language that an accused who receives a heavier sentence than he anticipated after a plea of guilt should thereafter be permitted to assert that he did not understand 'the natural effects' of his plea.
>
> "Petitioner does not and can not cite any decision either by this court or by the Supreme Court of Nebraska to the effect that the above quotations do not correctly state the law."

Your petitioner has no dispute with the above quotation taken from the opinion in the *Patton* case, *supra,* but your petitioner definitely does take issue with the balance of the quotation taken from the respondent's brief. The quo-

tation from the *Patton* opinion does state the law correctly, as far as it goes, but your petitioner wishes to point out that there are at least four separate and distinct reasons why it and the quotation from the *McCarty* case, *supra,* are wholly inapplicable to the instant case. First, it is a well known fact that a plea of guilt is not necessarily "a judicial confession of guilt", and even if it was, the quotation from the *McCarty* case seems to have overlooked those fundamental rights secured by the Sixth and Fourteenth Amendments to the Constitution of the United States—rights which cannot be waived and which are also included in Article I Section 11 of the Constitution of Nebraska. Second, as the respondent so aptly put it, he "must do more than rely upon a casual remark" if he hopes to prevail in his present objection. If the petitioner's citations be casual remarks, so, also, are those of the respondent. Third, the *Patton* case was a Federal case and the prosecution was made on an indictment rendered by a grand jury, not on the information of an unscrupulous county attorney, and because of this fact there was no reason why this Court should go to the trouble of showing just why a plea of guilty to an INDICTMENT is acceptable under the stated qualification. Fourth, the quotation as it appeared in the *Patton* opinion was originally used many years before by the Court of Appeals of New York in the case of *Cancemi* v. *People,* 18 N. Y. 136, and when the appropriate portion of the opinion therein is shown, it is easy to understand why the quotation from the *Patton* opinion will apply ONLY to cases wherein the prosecution is had upon an INDICTMENT returned by a grand jury, because the Court of Appeals of New York held that:

> "Criminal prosecutions involve public wrongs, a breach and violation of public rights and duties, which affect the whole community, considered as a community, in its social and aggregate capacity. The pen-

alties or punishment, for the enforcement of which they are a means to the end, are not within the discretion or control of the parties accused; FOR NO ONE HAS A RIGHT, BY HIS OWN VOLUNTARY ACT, TO SURRENDER HIS LIBERTY, OR PART WITH HIS LIFE. THE STATE—THE PUBLIC—HAVE AN INTEREST IN THE PRESERVATION OF THE LIBERTIES AND LIVES OF THE CITIZENS, AND WILL NOT ALLOW THEM TO BE TAKEN AWAY WITHOUT DUE PROCESS OF LAW, when forfeited, as they may be as a punishment for crimes. Criminal prosecutions proceed on the assumption of such a forfeiture, which, to sustain them, must be ascertained and declared as the law has prescribed. These considerations make it apparent that the right of a defendant, in a criminal prosecution, to effect, by consent, the conduct of the case, should be made more limited than in civil actions. IT SHOULD NOT BE PERMITTED TO EXTEND SO FAR AS TO MAKE RADICAL CHANGES IN GREAT AND LEADING PROVISIONS, AS TO THE ORGANIZATION OF THE TRIBUNALS, OR THE MODE OF PROCEEDING PRESCRIBED BY THE CONSTITUTION AND LAWS. Effect may justly and safely be given to such consent in many particulars, and the law does, in respect to various matters, regard and act upon it as valid. Objections to juries may be waived. The court may be substituted for triers to dispose of challenges to juries. Secondary, in place of primary, evidence may be received. Admissions of fact are allowed; and, in similar particulars, as well as in relation to mere formal proceedings generally, consent will render valid what, without it, would be erroneous. A PLEA OF GUILTY TO ANY INDICTMENT, WHATEVER MAY BE THE GRADE OF THE CRIME, WILL BE RECEIVED AND ACTED UPON, IF IT IS MADE CLEARLY TO APPEAR THAT THE NATURE AND EFFECT ARE UNDERSTOOD BY THE ACCUSED. IN SUCH A CASE THE PRELIMINARY INVESTIGATION OF A GRAND JURY, WITH THE ADMISSION OF THE ACCUSATION, THE INDICTMENT, IS SUPPOSED TO BE A SUFFICIENT SAFE-GUARD TO THE PUBLIC INTERESTS." (Capitals supplied.)

Thus, it can be seen WHY a plea of guilty to an INDICTMENT will be received and acted upon. IN SUCH A CASE THE

PRELIMINARY INVESTIGATION OF A GRAND JURY, WITH THE ADMISSION OF THE ACCUSATION, THE INDICTMENT, IS SUPPOSED TO BE A SUFFICIENT SAFE-GUARD TO THE PUBLIC INTERESTS. And it is for this same reason that Chapter 27-317 of the Compiled Statutes of Nebraska for 1929, the material part of which is quoted on pages 23 and 24 of your petitioner's original petition for writ of certiorari, requires that a judge of the District Court of Nebraska give a ten days' notice to both the accused and the prosecuting attorney before he may accept a plea of guilt and pass sentence thereon. This delay is considered necessary to safe-guard the interests of both the public and the defendant, and it was for this reason that the Legislature of the State of Nebraska enacted such a provision. This is the "strange interpretation of the statute" to which the respondent refers on page 28 of his brief. If it be strange, it is only because your petitioner has chosen to use the literal interpretation of the words contained in Chapter 27-317, *supra*, as they are defined in Webster's Unabridged Dictionary and as they are understood by common usage. Furthermore, your petitioner wishes to respectfully point out that Chapter 27-317, *supra*, specifically provides that only after giving such a ten days' notice does the district judge HAVE POWER TO accept a plea of guilty. Thus, the very jurisdiction of the court is dependent upon that ten days notice, and, after reading the quotation from the *Cancemi* case, *supra*, not even the respondent would dare to say that a defendant in a criminal action can waive the jurisdiction of the court.

In Point I of his brief, the respondent discusses each of the authorities relied upon by the petitioner, and, in almost every instance, after outlining the nature of the case involved in the citation, he stated that "The case has no bearing on the present action", or some similar statement with a like meaning. The basis for these statements, as implied by the respondent, is that none of the authorities

cited by your petitioner involve burglary or burglary with explosives. For example, after quoting a part of the syllabus from the case of *In re Nielsen,* 131 U. S. 176, the respondent stated that "The case involved double jeopardy, and has no bearing on the present action." Likewise, after quoting a portion of the syllabus in the case of *State* v. *Robertson,* 55 Neb. 41, 75 N. W. 37, the respondent stated that "In short, the case deals with the Statute of Limitations and has no bearing whatever on the present action." The objection, of course, "falls with the premise" (*Mooney* v. *Holohan,* 294 U. S. 103, 113), because if it did not, then this Honorable Court has, in the past, made and supported thousands of opinions with so-called "causual" (casual) remarks and excerpts from opinions that do not apply. For example, in the opinion rendered by this Court in the case of *Johnson* v. *Zerbst,* 304 U. S. 458, a case involving the possession and uttering of counterfeit money wherein the defendant was tried without counsel, this Court supported its opinion with quotations, among others, from the opinions rendered in the cases of (1) *Palko* v. *Connecticut,* 302 U. S. 319, a case involving murder and the alleged denial of due process of law; (2) *Hans Nielsen, Petitioner,* 131 U. S. 176, a case involving adultery, double jeopardy, and a denial of due process of law; (3) *Powell* v. *Alabama,* 287 U. S. 45, a case involving rape and the denial of due process of law; (4) *Mooney* v. *Holohan,* 294 U. S. 103, a case involving murder and the alleged denial of due process of law; and (5) *Woolsey* v. *Best,* 299 U. S. 1, a case involving the acceptance of deposits by an insolvent bank and the alleged denial of due process of law. Likewise, quotations from the opinions rendered in the cases of *Aetna Insurance* v. *Kennedy,* 301 U. S. 389, and *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, were cited by this Court in the *Johnson* opinion, *supra,* and it is a noteworthy fact that both of these cases were of a civil nature.

It is also a noteworthy fact that none of the seven aforementioned cases involved the possession and uttering of counterfeit money, yet this Court seemed to think that they all supported, in some manner or other, the opinion rendered in the case of *Johnson* v. *Zerbst, supra.* Your petitioner cited 39 different cases, each supporting, in its own way, a particular contention made in his petition for a writ of certiorari. If these cases are sufficient for reference and support in upholding various points in opinions rendered by this Honorable Court, then they are also sufficient, in their proper places, to uphold the contentions of your petitioner in the instant case.

In his effort to disprove your petitioner's contentions, the respondent completely overlooked a provision of Rule 38, Paragraph 2 of the Revised Rules of this Court, effective February 27, 1939, wherein it is stated that "Only the questions specifically brought forward by the petition for writ of certiorari will be considered." True enough, this particular sentence mentions only the PETITION for writ of certiorari, but is it not reasonable to believe that this Court will likewise consider only those OBJECTIONS which pertain directly to questions specifically brought forward by the petition for writ of certiorari? Only once in the entire 41 pages of his brief does the respondent object to a question specifically brought forward by your petitioner in his petition for a writ of certiorari, and this single objection is made on pages 29 and 30 of the respondent's brief following a reconstructed version of what is supposed to be your petitioner's fifth contention. Actually, this is a reconstruction of your petitioner's FOURTH contention in his petition for a writ of certiorari, and the objection made thereto by the respondent upholds, rather than tears down, your petitioner's argument on that particular contention. It is the respondent, and not the petitioner, who has distorted the language of this Court.

In an effort to support one of his objections, counsel for the respondent mentioned, on page 19 of his brief, a so-called "epidemic of applications for the writ of certiorari addressed to this court during the past several weeks by inmates of the Nebraska Penitentiary." Your petitioner has no argument with the respondent concerning any so-called epidemic, and the remark made by his counsel is entirely out of place in the respondent's brief. However, if there be such a epidemic, petitioner "cannot resist the temptation to sugg[illegible]" that counsel for the respondent, the Attorney General of Nebraska, would do well to investigate the procedure followed by the district courts of Nebraska, and, after such an investigation, acknowledge the truth and eliminate the cause of the so-called epidemic.

And again, on page 26 of his brief, counsel for the respondent mentioned "the petitioner herein and his CONFRERES." Petitioner wishes to respectfully point out to this Honorable Court, and to counsel for the respondent, that there are some nine hundred other men in this institution who are petitioner's confreres in the sense that they were all convicted, in some manner or another, of felonies. In any other sense they are not your petitioner's confreres, nor is your petitioner interested in any case other than the one before this Court now.

Truly, it is the objections made by the respondent's counsel, and not the contentions made by the petitioner, that can only be described as frivolous.

Your petitioner reiterates and respectfully submits that:

1. He was deprived of the immutable right to know the nature and cause of the accusation for which he was to answer, which deprivation is not denied by the respondent;

2. He was deprived of the fundamental right to the assistance of counsel for his defense;

3. He was deprived of the fundamental right to trial by a court of competent jurisdiction;

4. He did not knowingly, expressly, nor intelligently waive either or any of the foregoing immutable and fundamental rights of which he was deprived;

5. Only Federal questions of substance were brought forward in the petition for writ of certiorari;

6. The decision of the Supreme Court of Nebraska upon the Federal questions raised in that court by your petitioner is probably in conflict with applicable decisions of this Court;

7. All of the authorities cited in his petition support his right to a writ of certiorari, and, subsequently, a writ of *habeas corpus*.

It is further respectfully submitted that this case is a proper case for review by certiorari in this Court and that the petition for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT SMITH,
Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 364

ALBERT SMITH,

Petitioner,

vs.

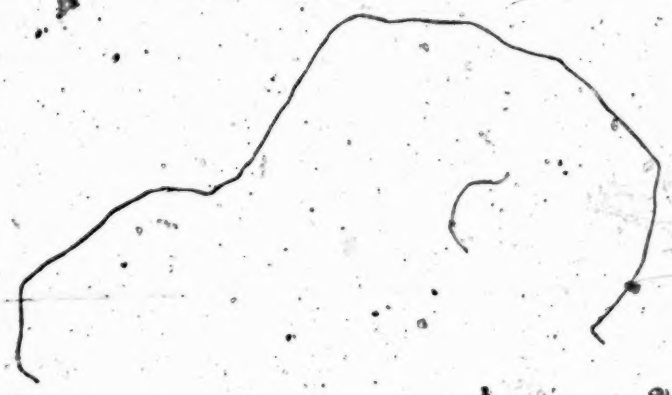
JOSEPH O'GRADY, WARDEN OF NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF FOR PETITIONER.

WILLIAM L. MARBURY, JR.,
Counsel for Petitioner.

JESSE SLINGLUFF, JR.,
Of Counsel.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 364

ALBERT SMITH,

Petitioner,

vs.

JOSEPH O'GRADY, WARDEN OF NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF FOR PETITIONER.

Opinions Below.

Neither the District Court of Lancaster County nor the Supreme Court of Nebraska filed opinions.

Jurisdiction.

The case is here on writ of certiorari granted by this Court on October 21, 1940, pursuant to Section 237 of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Sec. 1 (U. S. C. Tit. 28, Sec. 344 (b)). The

judgment sought to be reviewed was entered in the Supreme Court of Nebraska on June 3, 1940 (R. 34). It affirmed a judgment entered in the District Court of Lancaster County on February 28, 1940, dismissing a petition for writ of *habeas corpus* on the ground that the petition failed to state a case for the issuance of the writ.

That the judgment of the Supreme Court of Nebraska was final in character does not admit of dispute. However, other jurisdictional questions are presented which call for discussion in the light of a careful analysis of the record. These questions are dealt with hereinafter in the portion of this brief devoted to argument. For present purposes it is sufficient to say that the petitioner contends that the judgment under review necessarily decided adversely to petitioner a substantial federal question which was properly presented by the record.

Statutory Provisions Involved.

The proceedings in this case were initiated pursuant to Sec. 29-2801 of Art. 28 of Chapter 29 of the Compiled Statutes of Nebraska (1929 Ed.) reading as follows:

> If any person, except persons convicted of some crime or offense of which they stand committed, or persons committed of treason or felony, the punishment whereof is capital, plainly and specially expressed in the warrant of commitment, now is or shall be confined in and jail of this state, or shall be deprived of his or her liberty, and shall make application, either by him or herself or by any person on his or her behalf, to anyone of the judges of the District Court or to any County judge, and there is at the same time produced to such judge a copy of the commitment or cause of detention of such persons, or if the person so imprisoned or detained is imprisoned or detained without any legal authority, upon making the same appear to such judge, by oath or affirmation, it shall be his duty forthwith to

allow a writ of *habeas corpus*, which writ shall be issued forthwith by the clerk of the District Court, or by the county judge, as the case may require, under the seal of the court whereby the person allowing such writ is a judge, directed to the proper officer, person or persons who detained such prisoner (G. S. p. 804; Ann. 2513; Comp. 8097; R. S. 1913, 9247; C. S. 1922, 10276).

Other relevant provisions of the Compiled Statutes of Nebraska read as follows:

Sec. 29—2823. The proceedings upon any writ of *habeas corpus* shall be recorded by the clerk and judges, respectively, and may be reviewed as provided by law for appeal in civil cases.

Sec. 20—1911. Supreme Court, Appelate Jurisdiction Defined. A judgment rendered or final order made by the district court may be reversed, vacated or modified by the Supreme Court for errors appearing on the record.

Sec. 20—1912. Same proceeding for reversal of District Court Judgments and Decrees, Exceptions, Transcript, Filing Within Three Months Jurisdictional. The proceedings to obtain a reversal, vacation or modification of judgment and decrees rendered or final orders made by the District Court. * * * shall be by filing in the Supreme Court a transcript certified by the clerk of the District Court, containing the judgment, decree or final order sought to be reversed, vacated or modified within three months from the rendition of such judgment or decree or the making of such final order * * *; the filing of such transcript shall confer jurisdiction in such cause upon the Supreme Court.

Sec. 20—1919. Briefs in Supreme Court General Rules. What Appellant's Brief must set out, plain errors considered. The Supreme Court shall by general rule provide for the filing of briefs in all causes appealed to said court. The brief of appellant shall set out particularly each error asserted and intended to be

urged for the reversal, vacation or modification of the judgment, decree or final order alleged to be erroneous; but no petition in error or other assignment of error shall be required beyond or in addition to the foregoing requirement. The Supreme Court may, however, at its option, consider a plain error not specified in appellant's brief.

Sec. 28—538. Burglars, Violation, Penalty, Whosoever wilfully, maliciously and forcibly breaks and enters into any * * * railroad car factory, station house, railroad car * * * with intent to kill, rob, commit a rape, or commit any felony, with intent to steal property of any value, shall be punished by imprisonment in the penitentiary not more than ten years nor less than one year, or by a fine not exceeding five hundred dollars, or imprisonment in the jail of the county not exceeding six months.

Sec. 28—534. Burglary with Explosives, Penalty. Whoever shall break and enter either by day or by night, any building, whether inhabited or not, and open or attempt to open any vault, safe, or other secure place, by the use of, or the attempted use of, nitroglycerine, dynamite, gunpowder, or any other explosive, electricity as a means of burning or melting power agency or in any form of any electrical means whatsoever, acetylene gas, oxyacetylene gas, or any gas in any form whatsoever, with intent to steal or injure the property of another, shall be deemed guilty of burglary with explosives or by burning and upon conviction thereof shall be sentenced to the penitentiary for life, or for any other term not less than twenty (20) years.

The following rules of the Supreme Court of the State of Nebraska are also relevant. (See Revised Rules of the Supreme Court of the State of Nebraska in force September 19, 1938.)

3. Defaults. Whenever the brief of the party having the affirmative is not on file by brief day, the judgment will be affirmed or the proceedings dismissed, un-

less otherwise ordered on sufficient showing. When default has been made by the other party and there is due proof of service of process and the briefs of the party holding the affirmative are on file with proof of service thereof within the time provided by Rule 12, he may proceed *ex parte*. The hearing of no case shall be delayed by default of either party in serving or filing briefs. To avoid such result the case will be disposed of as if the delinquent party's brief had not been served and filed; provided that the court may under special circumstances and on suitable terms otherwise order.

14. Briefs—How Printed and Taxed.

a. How Printed.—All briefs shall be printed on unglazed white book paper on pages 6½ inches wide and 9½ inches long, trimmed size; the printed matter to be 24 picas wide and 42 picas long. The type used in the printing may be 12 point but not smaller than 11 point, except that exhibits may be printed in smaller sizes when necessary. Italic type may be used on citations.

d. The Clerk of this court shall refuse to receive or file any brief not prepared in accordance with this rule and he shall immediately notify counsel of the objections thereto.

Statement of the Case.

The purpose of this proceeding is to review a decision of the Supreme Court of Nebraska affirming a judgment of the District Court of Lancaster County, Nebraska, dismissing a petition for writ of *habeas corpus* filed on February 14, 1940. The significant allegations of that petition were as follows:

On September 19, 1932, the petitioner was taken into custody. Thereafter he was advised that he was being held for trial in Valley County, Nebraska, on a charge of burglary and that if he would plead guilty to that charge, he would be dealt with leniently. After a discussion with the

county attorney of Valley County, a bargain was arrived at "in which it was understood that if your petitioner would plead guilty, the sentence meted out to him by the court would not exceed three years' imprisonment in the Nebraska State Penitentiary" (R. 2). On September 27, 1932, petitioner was brought before the District Court of Valley County, Nebraska. As appears from the journal entry of the judgment, the petitioner waived preliminary examination and asked that he be arraigned at once. "Thereupon the Defendant was duly and legally arraigned and plead 'Guilty' to the Information as charged." The defendant was thereupon sentenced to confinement at hard labor in the Nebraska Penitentiary for a period of twenty years (R. 3).

Prior to entering his plea, petitioner had never seen a copy of the information and was under the impression that he was pleading guilty to a charge of common burglary (which carries a maximum penalty of ten years in the State Penitentiary, *supra*, p. 4). As soon as the sentence had been pronounced, petitioner protested and requested that he be furnished with a copy of the charge. This request was refused (R. 3). Petitioner then requested permission of the court to withdraw his pleas of guilty and at the same time requested that an attorney be appointed to assist and advise him and that he be given an opportunity to defend himself (R. 3). These requests were likewise refused and within the hour petitioner was removed to the State Penitentiary (R. 3). It was not until after petitioner had been committed to the penitentiary that he discovered that he had been "duped and inveigled into entering a plea of guilt to a charge of burglary with explosives" (which carries a minimum penalty of twenty years in the State Penitentiary, *supra*, p. 4). Petitioner knew nothing of appellate procedure and lacked funds to employ counsel and was therefore unable to carry an appeal to the Supreme Court of

Nebraska. His petition herein was prepared with the aid of another inmate of the Nebraska State Penitentiary (R. 3).

The petition for the writ of *habeas corpus* challenged the legality of the commitment pursuant to which petitioner was being detained in the Nebraska Penitentiary on the ground that the commitment was based upon a void and illegal judgment. In support of that petition, a number of contentions were advanced, of which the following are material here: (1) that petitioner was deprived of his constitutional right to know the nature of the accusation for which he was to answer, contrary to the Sixth Amendment to the Constitution of the United States (R. 4), (2) that he was deprived of his constitutional right to have the assistance of competent legal counsel to aid and advise him, contrary to the Sixth Amendment to the Constitution of the United States (R. 4), and (3) that contrary to the Fourteenth Amendment to the Constitution of the United States, he was arbitrarily deprived of his constitutional right to due process of law "in that the trial court did not have jurisdiction to arraign, or to accept a plea from your petitioner, without first supplying him with a copy in writing of the nature and cause of the accusation for which he was to answer; of without notifying him in open court, in language sufficiently common to be understood by the petitioner, of the nature and cause of the accusation for which he was to answer; nor did the trial court have jurisdiction to proceed to trial against your petitioner, after your petitioner had requested the assistance of an attorney, without first appointing competent legal counsel to aid and advise him in his defense" (R. 5). Simultaneously with the petition for writ of *habeas corpus,* petitioner filed a motion for leave to proceed *in forma pauperis* and for the appointment of counsel to represent him (R. 11-13).

On February 28, 1940, the trial court entered an order denying the petition for writ of *habeas corpus* "because the petition filed herein does not state a cause of action therefor" (R. 13). At the same time, the trial judge addressed a communication to the petitioner reading as follows (R. 14):

> "My dear sir:
>
> The honorable John L. Polk, presiding judge for this district, has assigned to me for disposition your petition for writ of *habeas corpus* filed in this court. I am sorry to inform you that you have not stated a cause of action which permits this court to grant a writ of *habeas corpus,* and your application, therefore, has been denied and your petition dismissed at your costs.
>
> Your own petition shows that more than seven years ago in a district court of this State you waived preliminary hearing, were arraigned upon the information, and pleaded guilty thereto in open court. Under such circumstances the law is that you waived any right to have the information served upon you as contended for in your petition.
>
> The statute, Section 29-2801, provides: 'If the person so imprisoned or detained is imprisoned or detained without any legal authority, upon making the same appear to such judge, by oath or affirmation, it shall be his duty forthwith to allow a writ of *habeas corpus.*'
>
> If the statements made in your petition are true, you probably suffered an injustice, but the remedy cannot be by *habeas corpus.* To obtain release by *habeas corpus,* the judgment must be absolutely void. Your best remedy, under the circumstances, is before the Parole and Pardon (fol. 65) Board of the State of Nebraska which is composed of men who are always willing to give attention to such matters if they appear to have merit in them."

On March 4, 1940, petitioner filed a motion for reconsideration of the order denying the petition for writ of *habeas*

corpus (R. 13-21). This motion, while extremely inartificial, clearly presented the contention that petitioner had been denied the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, by reason of the trickery and deception practiced upon him by the county attorney of Valley County, Nebraska, as the result of which he had been induced to plead guilty to a crime with which he did not know that he had been charged. This motion was overruled (R. 21).

On March 25, 1940, petitioner filed his notice of appeal (R. 27), together with motions for the appointment of counsel (R. 23), and the allowing of the costs of printed briefs for appeal (R. 25). Each of these motions stated that the petitioner was without funds to pay such costs or to obtain the services of counsel. These motions were promptly overruled (R. 27). Petitioner thereupon filed in the Supreme Court of Nebraska his motion for the appointment of counsel and the allowance of the cost of printed briefs on appeal, or in the alternative, for permission to file typewritten briefs, or in the alternative, that the appeal be heard on the record (R. 28). Attached to the motion were copies of a type-written brief* which clearly presented the federal questions which the petitioner sought to raise.

On May 20, 1940, the Supreme Court of Nebraska entered an order denying petitioner's motion. This order recited that "the court having examined the transcript from the district court of Lancaster County, which transcript contains appellant's original petition for writ of *habeas corpus* containing a brief in support of such petition, and having also examined the typewritten brief of appellant tendered herein, and being fully advised in the premises, finds that

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*NOTE.—In printing the transcript of record, this brief was omitted by the clerk of this Court (R. 33). A copy is, however, included in the original transcript of record.

the appeal herein is without merit and that the record contains no probable error'' (R. 34).

Thereafter, on June 3, 1940, the Supreme Court entered a final judgment, the material portion of which is as follows:

> ''This cause coming on to be heard upon appeal from the district court of Lancaster County, the same having been reached in its regular order, and no briefs appearing on file as required by the rules of court, it is by the Court considered, ordered and adjudged that the judgment of said district court be, and hereby is, affirmed'' (R. 34).

The petition for certiorari was filed in this Court on August 22, 1940 and granted on October 21, 1940.

Specification of Errors.

1. The Supreme Court of Nebraska erred in affirming the judgment of the trial court dismissing the petition for the writ of *habeas corpus*.

2. The Supreme Court of Nebraska erred in failing to hold that the judgment originally entered in the District Court of Valley County was wholly void.

3. The Supreme Court of Nebraska erred in failing to hold that the petitioner was entitled to be released from custody under a commitment based upon a judgment obtained in violation of the guarantee of due process of law contained in the Fourteenth Amendment to the Federal Constitution.

Summary of Argument.

I.

This court has jurisdiction pursuant to Section 237 of the Judicial Code as amended. The judgment of the Supreme Court of Nebraska was final in character. The peti-

tion for the writ of *habeas corpus* and the motion for reconsideration, taken together, adequately presented a substantial claim based upon the Federal Constitution. The orders of the Supreme Court of Nebraska, taken together, necessarily decided that claim adversely to the petitioner.

II.

The Supreme Court of Nebraska erred in affirming the judgment of the trial court denying the petition for writ of *habeas corpus*. Under the Nebraska law, the writ of *habeas corpus* must be granted upon a showing that petitioner is being detained pursuant to a judgment which the court lacked jurisdiction to enter. The District Court of Valley County had no jurisdiction to enter a judgment based upon a plea of "guilty" obtained by misrepresentation. Such a judgment deprived petitioner of his liberty without the due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution.

ARGUMENT.

The Jurisdiction of This Court.

A.

The Judgment Sought To Be Reviewed Is Final In Character.

The order of the Supreme Court of Nebraska entered on June 3, 1940, affirming the judgment below finally disposed of all questions presented by the record. *De Bolt* v. *McBrien*, 96 Neb. 237, 147 N. W. 462. That a judgment of the highest court of a state affirming an order dismissing a

petition for writ of *habeas corpus* is final in character is not debatable. In *Bryant* v. *Zimmerman*, 278 U. S. 63, Mr. Justice VAN DEVANTER said (at page 70):

> "In the early case of *Holmes* v. *Jennison*, 14 Pet. 540, 563, 568, 597, this Court held after much consideration that a proceeding in habeas corpus in a state court to obtain the release of one held in custody upon a criminal charge, where the detention is alleged to be in violation of the Constitution of the United States, is a 'suit' within the meaning of the jurisdictional statute, and that an order of the state court of last resort refusing to discharge him is a final judgment in that suit and subject to review by this Court. That holding has been respected and given effect in an unbroken line of later decisions, all of which in their material facts and surroundings were like the case now before us. It also has been followed in other cases related in principle."

B.

A Substantial Federal Question Was Properly Presented To The Court Below.

The petition for the writ of *habeas corpus* and the motion for reconsideration were drawn by petitioner with the assistance of another inmate of the Nebraska State Penitentiary. Nevertheless, they were adequate to present the question whether the judgment pursuant to which petitioner is now being detained in the Nebraska State Penitentiary, was void because obtained without due process of law, contrary to the Fourteenth Amendment to the Federal Constitution.

The facts set forth in those petitions, if true, show that an official of the State of Nebraska misled petitioner as to the nature of the offense with which he was charged and induced him to enter a plea of "guilty" to that charge

under false representations as to the sentence which would be meted out to him, and that the trial court, with knowledge of the deception which had been practiced upon the petitioner, refused to permit withdrawal of petitioner's plea and refused petitioner's request for a copy of the information and the appointment of counsel to represent him. Clearly the contention that the petitioner was denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, is not lacking in substance. See *infra* pp. 21-22.

The fact that petitioner based some of his contentions on the Sixth rather than the Fourteenth Amendment, is unimportant, inasmuch as the petitioner's pleadings clearly presented a claim of federal right. In *Bryant* v. *Zimmerman,* 278 U. S. 63, Mr. Justice VAN DEVANTER said at page 67:

> "No particular form of words or phrase is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

Assuming, therefore, that the petition for the writ of *habeas corpus* and the motion for reconsideration were adequate to present a substantial Federal question, there remains for consideration whether, under the practice prevailing in the State of Nebraska, the court is free, on petition for a writ of *habeas corpus,* to consider the facts upon which petitioner's claim to federal right was based. Where the writ of *habeas corpus* is invoked in state tribunals, this Court looks to the courts of that state for a definition of the scope of the proceedings. *Herndon* v. *Lowry,* 301 U. S. 242; compare *Chambers* v. *Florida,* 309 U. S. 227.

The letter addressed by the trial judge to the petitioner indicates that *habeas corpus* is the proper method to obtain release from a void judgment (R. 15). This is clearly in accordance with the decisions of the Supreme Court of Nebraska. Thus in the case of *Michaelson* v. *Beemer*, 72 Neb. 761, 101 N. W. 1007, it was held proper, on petition for writ of *habeas corpus*, to examine into the validity of the commitment of petitioner who, after entering a plea of not guilty, waived a jury trial and was found guilty by the court sitting without a jury. The Supreme Court of Nebraska said (at page 763):

> "The first question presented is as to whether habeas corpus will lie in the case at bar, no error proceedings having been instituted for the purpose of reversing the judgment of the District Court, in which the commitment was issued. We have frequently held that the writ of habeas corpus is not a corrective remedy, and is never allowed as a substitute for the plea of a writ of error. This rule is well stated in the case of *In re Fenton*, 55 Neb. 703, in which we held:
>
> > 'The writ of habeas corpus cannot operate as a proceeding in error. If a person is restrained of his liberty by virtue of an absolutely void judgment, he must be discharged on habeas corpus. To obtain release by such a proceeding, the judgment or sentence must be more than merely erroneous; it must be an absolute nullity.'
>
> This doctrine is supported by an unbroken line of authorities in both the federal and state courts of this nation, and consequently the question we are confronted with at the threshold of this controversy is, was the judgment and sentence of the District Court absolutely void, and the warden, through his counsel the Deputy Attorney General, contends that they were merely erroneous.

* * * * * * *

When the information was filed in the District Court for Garfield County, charging in statutory language the prisoner with the offense of grand larceny, and he came into court either voluntarily or under the custody of the sheriff, the court became possessed, under the laws of the state, with the jurisdiction of the person of the defendant, and was authorized to make such orders touching the arraignment of the prisoner, his admission to bail, or commitment in default of bail, as the statute provides. But when the defendant pleaded not guilty, and the cause was set for trial on such plea, the only tribunal provided by the constitution and the laws of this state that had authority to determine whether the defendant was guilty or innocent of the offense charged in the information, was a jury summoned from the county in which the offense was alleged to have been committed. When the judge of the court, acting under a mistaken conception of the effect of the consent of the prisoner, undertook to determine the question of his guilt or innocence of the felony charged, his judgment and sentence passed on such judgment was a mere nullity and absolutely void. From this line of reasoning it follows that the commitment under which the respondent warden detains the petitioner in the penitentiary is a legal nullity. It therefore follows that so much of the judgment of the District Court as remanded the prisoner to the custody of the warden of the penitentiary is erroneous and should be set aside."

So in the case of *In re Resler,* 115 Neb. 335, 212 N. W. 765, it was held proper, on petition for writ of *habeas corpus* to examine into the validity of a judgment of the trial court sentencing petitioner to penal servitude where the judgment was alleged to have involved a violation of a provision of the State Constitution guaranteeing against double jeopardy. In that case the Court said (at p. 338):

"That, in this case, the petitioner may properly present the question involved by *habeas corpus,* we have no

doubt. It is firmly established that if a court or a judge thereof which render a judgment, or who enters an order, has no jurisdiction to perform the act done, either because the proceeding or the law under which it is taken is unconstitutional, or for any other reason the judgment is void, it may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged. *In re Havlik,* 45 Neb. 747; *In re Application of McMonies,* 75 Neb. 702; *In re Vogland, 48 Neb. 37.*

In the present case it is true that the ground for *habeas corpus* was not the invalidity of an act of the legislature under which the petitioner was informed against, but because it was claimed to be a second prosecution for the same offense contrary to the express provision of our Constitution. In other words, the contention is that the constitutional rights of the defendant were violated by her second arrest and detention for the same offense contrary to the express terms of the Constitution that no person shall be twice brought in jeopardy for the same offense. *It is difficult to see why a conviction and punishment under an unconstitutional law is more a violation of a person's constitutional rights than an unconstitutional conviction under a valid law.* In the first case it is true the court has no authority to take cognizance of the case, but in the second it has no authority to render judgment against the defendant." (Emphasis supplied.)

To the same effect see *Kuwitzky* v. *O'Grady,* 135 Neb. 466, 282, N. W. 396.

On the other hand, in the case of *Darling* v. *Fenton,* 120 Neb. 829, 225 N. W. 582, the Supreme Court of Nebraska held that on petition for writ of *habeas corpus,* the court could not inquire into whether the judgment, pursuant to which petitioner was being detained, had been entered as the result of a plea of "guilty" to a charge of murder induced by fear of mob violence. This case was cited with

approval in *Carlsen* v. *State,* 129 Neb. 84, 261 N. W. 339, where the Court said at page 345:

> "* * * it should be noted that the writ of *habeas corpus* does not afford a corrective judicial process to remedy an error of fact at the trial, without which a conviction would not have resulted. *Habeas Corpus is not a proper remedy to secure a release from prison of one sentence upon a plea of guilty induced by fear. Darling* v. *Fenton,* 120 Neb. 829."

Other cases lay down the general rule that on petition for writ of *habeas corpus,* the Court cannot consider facts not shown by the record of the original proceedings unless such facts are such as to show that the court lacked "jurisdiction" to enter the judgment. *Hulbert* v. *Fenton,* 115 Neb. 818, 215 N. W. 104. Compare *Alexander* v. *O'Grady,* 137 Neb. 645, 290 N. W. 718; *Davis* v. *O'Grady,* 137 Neb. 708, 281 N. W. 82; *State* v. *O'Grady,* 137 Neb. 824, 291 N. W. 497.

It may be observed that if the scope of the writ of *habeas corpus* is so narrow as to preclude consideration of the facts set forth in this record, then the Nebraska law provides no remedy for the vindication of petitioner's rights. Assuming that the writ of error *coram nobis* has not been abolished by recent legislation in Nebraska, (as to which see 19 *Nebraska Law Bulletin* 150), petitioner could not avail himself of that remedy in view of the length of time which has elapsed since the judgment was entered against him in the District Court of Valley County. In *Newcomb* v. *State,* 129 Neb. 69, 261 N. W. 348, it was held that an application for the writ of error *coram nobis* must be brought within two years of the date of judgment and that confinement in the State Penitentiary was not a disability sufficient to extend that period.

In the absence of clear and compelling decisions of the Nebraska courts, this Court will hesitate to accept any con-

tention restricting the scope of the writ of *habeas corpus* so narrowly as to preclude review of the validity of a judgment obtained in clear violation of the guarantees of the Federal Constitution. *Mooney* v. *Holohan,* 294 U. S. 103. Accordingly, it is submitted that the record properly presented for the consideration of the state courts, a substantial federal question, namely, whether the judgment pursuant to which petitioner is being detained in the Nebraska State Penitentiary, deprived petitioner of his liberty without due process of law, contrary to the Fourteenth Amendment to the Federal Constitution.

C.

The Judgment Below Did Not Rest Upon An Adequate Non-Federal Ground

Assuming that under the Nebraska practice the scope of the writ of *habeas corpus* is sufficiently broad to open for review the validity of the judgment originally entered in the District Court of Valley County and to permit the court to determine that validity in the light of the facts set forth in the petition, it is clear that the judgment of the District Court of Lancaster County necessarily decided the federal questions presented by the petitioner. Under the Nebraska law, a petition for the writ of *habeas corpus* may be dismissed if the petition on its face shows that the granting of the writ is without merit. However, for the purpose of determining the merit of the petitioner's claim, the facts set forth in the writ are taken to be true. *Darling* v. *Fenton,* 120 Neb. 829, 235 N. W. 582; and see Compiled Statutes of Nebraska (1929 Ed.) Sec. 29-2801, *supra,* p. 2.

Whether the decision of the Supreme Court of Nebraska necessarily decided the federal question presented by the record is a question of greater difficulty. If the final order of the Supreme Court of Nebraska entered on June 3,

1940, is taken by itself, there is color for the contention that the judgment below rested upon an adequate non-Federal ground and is hence not subject to review here. Under the Nebraska statutes regulating appeals in such cases, the Supreme Court is empowered to provide by rule, for the filing of briefs and is not bound to consider errors not specified in appellant's brief, *supra* p. 3. In the exercise of this power, the Supreme Court has by rule required the filing of printed briefs in default of which "the judgment will be affirmed or the proceedings dismissed, unless otherwise ordered on sufficient showing", *supra* pp. 4-5. As the appellant failed to file a printed brief as required by the rules, it may well be argued that the court below was not required to consider any errors appearing in the record.

It is worthwhile to note, however, that both the statute and the rule of court clearly reserve the right to consider "plain error even if not specified in appellant's brief". Nor is it obligatory on the court to affirm the judgment below because of default in the filing of such brief. *DeBolt* v. *McBrien*, 96 Neb. 247, 147 N. W. 462. Accordingly, even if this court were to treat the order of June 3, 1940 as standing alone, the appropriate proceeding, in view of *Patterson* v. *Alabama*, 294 U. S. 600, would seem to be to remand the case for further consideration by the Supreme Court of Nebraska.

In the case cited, this court reviewed on writ of certiorari a judgment of the Supreme Court of Alabama confirming a conviction of rape. The defendant had moved to quash the trial venire because of the exclusion of negroes from jury service in the county where the trial was had. Evidence supporting the motion was embodied in bills of exception which the Supreme Court of Alabama refused to entertain because filed too late. Under the Alabama statutes, it appeared that the court might, in its discretion,

have considered the evidence set forth in the untimely bill of exceptions. Finding that the evidence was sufficient to show that the petitioner had been denied the equal protection of the laws guaranteed by the Fourteenth Amendment, this court remanded the case to the state court for further proceedings in the light of this determination.

One factor influencing the result in the *Patterson* case is not present here, namely, that in *Powell* v. *Alabama*, 287 U. S. 45, this court had reversed the conviction of another defendant tried in the same proceeding. The absence of this factor would not seem to justify a different result here. If the court below had been convinced that the judgment upon which petitioner's commitment rested was void because obtained in violation of the Fourteenth Amendment, there can be little doubt that it would have exercised its discretion to deal with so flagrant an error. At least the court "should have an opportunity to examine its powers in the light of the situation."

In any event, petitioner's right of review of the judgment below does not rest upon such subtleties. The order of June 3, 1940 was but the necessary consequence of the court's previous order of May 20, 1940, denying petitioner's motion to dispense with the printing of his brief. The two orders must be read together. When this is done, the true nature of the ruling below becomes apparent. For the avowed reason for the denial of the petitioner's motion was the finding of the court, after examination of the record and of typewritten briefs, that the appeal lacked merit. *Supra* pp. 9-10. Plainly it would have been futile for petitioner to file a printed brief in a case already decided against him on the merits. The salutary rules limiting the jurisdiction of this court do not deserve the reproach that they require the denial of fundamental rights because of the failure of litigants to accomplish useless formalities.

Compare *Rogers* v. *Alabama,* 192 U. S. 226, where MR. JUSTICE HOLMES said (at page 230):

> "It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights."

It is submitted, therefore, that the courts below must be deemed to have considered and disposed of the substantial federal question presented by the petitioner.

Reference should be made at this point to the previous discussion with reference to the scope of the writ of *habeas corpus.* Admittedly, nothing in the Federal Constitution restricts the state's right to determine the ambit of the writ. So long as an adequate method for the vindication of federal rights is supplied, the state's freedom of choice in providing remedies remains untrammelled. Accordingly, the refusal by the state court, on writ of *habeas corpus,* to vindicate a claim of federal right because of the form of remedy invoked, has been deemed an adequate non-federal ground of decision. *People of State of New York Ex Rel Doyle* v. *Atwell,* 261 U. S. 590. However, for reasons hereinbefore discussed, it would seem that this principle has no application in the case at bar.

The Merits.

On the merits, the issue is whether the judgment pursuant to which petitioner is now being detained, is wholly void. We must accept the conclusion of the Supreme Court of Nebraska that nothing in the Constitution or Statutes of that State justifies an affirmative answer, *Powell* v. *Alabama,* 287 U. S. 45, 60. But a judgment entered in disregard of the guarantees of the Fourteenth Amendment is clearly void. And it is one of the highest functions of this court to guide State tribunals in the proper construction and appli-

cation of those guarantees. *Chambers* v. *Florida,* 309 U. S. 227; *Avery* v. *Alabama,* 308 U. S. 444, 447; *Herndon* v. *Lowry,* 301 U. S. 242; *Bryant* v. *Zimmerman,* 278 U. S. 63.

That the judgment of the District Court of Valley County is wholly void, does not admit of doubt, in the light of recent decisions of this Court. A judgment based on a plea of "guilty" obtained by deception is no more valid than a judgment based on a jury's finding of guilt, obtained in like manner. Compare *Mooney* v. *Holohan,* 294 U. S. 103; *Chambers* v. *Florida, supra.* The refusal to permit such a plea to be withdrawn, to furnish the petitioner with a copy of the charge and to appoint counsel for his defense, presents a case no less flagrant than some which have recently provoked the condemnation of this court. *Powell* v. *Alabama,* 287 U. S. 45; *Norris* v. *Alabama,* 294 U. S. 587; *Brown* v. *Mississippi,* 297 U. S. 238; *Pierre* v. *Louisiana,* 306 U. S. 354.

Although *Avery* v. *Alabama,* 308 U. S. 444, gives strong support to such a contention, it is not necessary for the purposes of this case to argue that the right to the assistance of counsel guaranteed by the Fourteenth Amendment is no less extensive than that afforded by the Sixth (as to which see *Johnson* v. *Zerbst,* 304 U. S. 458). The facts in this record require the invocation of no such sweeping generality. We have here an accused man, unlettered in the law, present in court for the first time in his life, induced to plead guilty of a crime which carries a maximum sentence of life imprisonment by false representations as to the nature of the charge and as to the consequences of his plea, and once having fallen into the trap, denied the means of extricating himself. Protection against such a flagrant violation of fundamental fairness is certainly "of the very essence of a scheme of ordered liberty." *Palko* v. *Connecticut,* 302 U. S. 319, 325.

Conclusion.

The judgment of the Supreme Court of Nebraska should be reversed.

Respectfully submitted,

WILLIAM L. MARBURY, JR.
Counsel for Petitioner.

JESSE SLINGLUFF, JR.
Of Counsel.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 364

ALBERT SMITH, PETITIONER

V.

JOSEPH O'GRADY, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA, RESPONDENT.

RESPONDENT'S BRIEF IN RESISTANCE TO APPLICATION OF PETITIONER FOR WRIT OF CERTIORARI

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 364

ALBERT SMITH, PETITIONER

V.

JOSEPH O'GRADY, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA, RESPONDENT.

RESPONDENT'S BRIEF IN RESISTANCE TO APPLICATION OF PETITIONER FOR WRIT OF CERTIORARI

WALTER R. JOHNSON,
Attorney General of Nebraska

H. EMERSON KOKJER,
C. S. BECK,
CHARLES F. BONGARDT
Assistant Attorneys General
of Nebraska.
Counsel for Respondent.

To The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Your respondent respectfully shows:

The petitioner in this case, Albert Smith, is asking that a writ of certiorari issue out of this court to review a

judgement of the Supreme Court of Nebraska entered in the above cause on June 3, 1940, affirming a judgement of the District Court of Lancaster County, Nebraska, dismissing a petition for a writ of habeas corpus on the ground that petitioner failed to state a cause of action.

The case involves no question of national or sectional importance, nor any remote Federal question, nor any inter-court conflict as to the law. It involves merely a question of Nebraska law, decided adversely to Petitioner by the Supreme Court of Nebraska.

Petitioner is merely seeking another hearing in this court which is obviously for the purpose of rehearing only.

NATURE AND STATEMENT OF THE CASE

Petitioner, Albert Smith, filed a petition in the District Court of Lancaster County to secure his release from the Nebraska State Penitentiary by means of a writ of habeas corpus. At the time, he was being held in the penitentiary by virtue of a commitment issued out of the District Court of Valley County, Nebraska.

A copy of the Information and Judgment in and of the District Court of Valley County, Nebraska, pursuant to which petitioner was committed, was attached to and made a part of the petition filed by petitioner in the District Court of Lancaster County, Nebraska, praying for the writ of habeas corpus. It reads as follows:

INFORMATION—COUNTY ATTORNEY

State of Nebraska, } ss.
County of Valley, }

In the District Court of the Eleventh Judicial District of Nebraska, in and for Valley County.

THE STATE OF NEBRASKA, *Plaintiff*, vs. ALBERT SMITH *Defendant* } INFORMATION—Burglary with Explosives,—Section 28-543.

BE IT REMEMBERED, That George A. Munn, County Attorney in and for Valley County, and in the Eleventh Judicial District of the State of Nebraska, who prosecutes in the name and by authority of the State of Nebraska, comes here in person, into Court at this, the September 27 term, A. D. 1932, thereof, and for the State of Nebraska gives the Court to understand and be informed that Albert Smith late of the county aforesaid, did on the Fifteenth day of September, A. D., 1932, in the County of Valley and State of Nebraska aforesaid, then and there being, did then and there wilfully, unlawfully, feloniously, burglariously, maliciously and forcibly break and enter into the Chicago, Burlington & Quincy Railroad Company, a corporation, station house depot building in the city of Ord, Valley County, Nebraska, and did then and there wilfully, unlawfully, feloniously and maliciously by the use of explosive commonly called nitroglycerine or soup forcibly explode and break open a safe there situated with the intent and accomplished purpose then and there wilfully, unlawfully, feloniously, burglariously and maliciously to injure said safe, the property of the Railway Express Agency, Inc., a corporation, and to steal take and carry away from said building and safe the goods and chattels of the said Chicago, Burlington & Quincy Railroad Company, a corporation, and Railway Express Agency, Inc., a corporation, without the

consent and against the will of the said Chicago, Burlington & Quincy Railroad Company, a corporation, and Railway Express Agency, Inc., a corporation, the respective owners thereof—Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Nebraska.

(S) George A. Munn
George A. Munn,
County Attorney.

STATE OF NEBRASKA, }
COUNTY OF VALLEY, } ss.

I, _____ Sheriff in and for Valley County, Nebraska, do hereby certify that on the _____ day of _____, A. D. 19_____ in the county aforesaid, I served a true and certified copy of the within information on the herein Defendant _____ _____ by delivering to him personally a true and certified copy of said information with all endorsements thereon.

Dated at Ord, Nebraska, in said county this _____ day of _____, A. D., 19_____.

_____
Sheriff.

STATE OF NEBRASKA, }
COUNTY OF VALLEY, } ss.

George A. Munn, being first duly sworn, upon his oath says that he is the County Attorney in and for Valley County, in the Eleventh Judicial District of the State of Nebraska, and that the allegations and charges against the defendant Albert Smith in the within information

are true as he verily believes.

George A. Munn
County Attorney.

Subscribed in my presence and sworn to before me, this *Twenty-seventh* day of *September,* A. D., 1932.

Alfred A. Wiegardt,
(Seal) Clerk of the District Court.
(S) Alfred A. Wiegardt

IN THE DISTRICT COURT OF VALLEY COUNTY, NEBRASKA.

THE STATE OF NEBRASKA,
Plaintiff,
vs.
ALBERT SMITH,
Defendant
} JOURNAL ENTRY

Now on this 27th day of September, 1932, the above entitled action came on for hearing upon the Information filed herein by the County Attorney in and for the County of Valley, State of Nebraska.

The Plaintiff, THE STATE OF NEBRASKA, being represented in open Court by George A. Munn, County Attorney, and the Defendant, ALBERT SMITH, being present in person in Open Court. Trial had.

Defendant appearing in Court and waives preliminary examination and asks that he be arraigned at once.

Thereupon the Defendant was duly and legally arraigned and plead "Guilty" to the Information as charged.

IT IS THEREFORE CONSIDERED AND ADJUDGED that the Defendant, Albert Smith, be taken to the Nebraska Penitentiary at Lancaster, Nebraska, and

there confined at hard labor, Sundays and Holidays excepted, for a period of Twenty Years and that he pay the costs of this action. Solitary Confinement forms no part of this Sentence.

BY THE COURT,
(S) Edwin P. Clements
Judge of the District Court.

An examination of the petition for the writ of habeas corpus held insufficient by the District Court of Lancaster County reveals that the material allegations therein are as follows:

"I

Your petitioner contends and alleges that he was deprived of his constitutional right to know the nature and cause of the accusation for which he was to answer, and that he was deprived of a copy thereof in writing, all of which is provided by Chapter 29-1802 of the Compiled Statutes of the State of Nebraska for 1929, and by Article I Section 11 of the Constitution of the State of Nebraska, and by the Sixth Amendment to the Constitution of the United States.

"II

Your petitioner contends and alleges that he was deprived of his constitutional right to have the assistance of competent legal counsel to aid and advise him, all of which is provided by Chapter 29-1803 of the Compiled Statutes of Nebraska for 1929, and by Article I Section 11 of the Constitution of the State of Nebraska, and by the Sixth Amendment to the Constitution of the United States.

"III

Your petitioner further contends and alleges that he did not waive the fundamental constitutional rights of which he was deprived as shown in the first and second preceding allegations of this petition, namely, (1) to know the nature and cause of the accusation for which he was to answer, or to receive a copy thereof in writing; and (2) to the assistance of competent legal counsel.

"IV

Your petitioner further contends and alleges that the judgment as pronounced by the trial court, and as shown by your petitioner's "Exhibit A," is void and a legal nullity and was rendered contrary to and in violation of Chapters 29-2201 and 29-2202 of the Compiled Statutes of Nebraska for 1929, in that it does not show a conviction by a jury or a finding of guilt by the trial court.

The Lancaster County District Court dismissed the petition for a writ of habeas corpus, and petitioner appealed to the Supreme Court of Nebraska, which, on June 3, 1940, affirmed the judgment.

It is perfectly clear that the provisions of the Nebraska State Constitution and of the Nebraska Statutes constitute the sole basis of the petitioner's present application for a writ of certiorari.

It is equally clear that it is primarily the province of the Supreme Court of Nebraska to interpret the Constitution and Statutes of its own State.

It is finally clear that if petitioner is to succeed in his present application for a writ of certiorari the burden is

upon him to show that the Constitution and Statutes of Nebraska as interpreted by the Supreme Court of that State, are, any or all of them, repugnant to the Constitution of the United States.

SUMMARY OF POINTS AND ARGUMENT

Point A.—On an application for a writ of habeas corpus, errors or irregularities in the criminal trial, not jurisdictional, will not be considered.

Point B.—No court may by writ of habeas corpus properly release a prisoner under conviction and sentence of another court, unless for want of jurisdiction of cause or person or some matter rendering the proceeding void.

Point C.—A criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution and conducted to the settled course of judicial proceedings as established by the law of the state, is due process of law in the sense of U. S. Constitution, 14th Amendment, so long as it includes notice and a hearing or an opportunity to be heard before a court of competent jurisdiction, according to established modes of procedure.

Point D.—This court will not review and revise the construction affixed to a state statute as to a question of local law by the court of last resort of the state.

Point E.—The writ of habeas corpus will not issue unless the averments of the petition, taken as true, show probable cause, and a prima facie case for relief.

Point F.—Petition herein for a writ of certiorari should be denied as it fails to show any error in the proceedings under which petitioner was convicted.

Point G.—Petition herein for a writ of certiorari should be denied as it fails to show that if any error was committed in the proceedings, such error was jurisdictional or such as to render the judgement of conviction void.

Point H.—Petition herein for a writ of certiorari should be denied as it fails to show that any rights of petitioner under the Constitution or laws of the United States have been impaired.

Point I.—Petition herein for a writ of certiorari should be denied as none of the authorities cited by petitioner in his supporting brief sustains his claim for a writ.

ARGUMENT

Point A

On an application for a writ of habeas corpus, errors or irregularities in the criminal trial, not jurisdictional, will not be considered.

This point has been repeatedly decided by both the Supreme Court of Nebraska and by this court. *In re John Fanton*, 55 Neb. 703, 76 N. W. 447; *Hulbert v. Fenton*, 115 Neb. 818, 215 N. W. 104; *Alexander v. O'Grady*, 290 N. W. 718; *Hawk v. O'Grady*, 290 N. W. 911; *Frank v. Mangum*, 237 U. S. 309; *Keize v. Henry*, 211 U. S. 146, 29 Sup. Ct. 41, 53 L. Ed. 125; *In re Lewis*, 114 Fed. 963; *In re Wood*, 140 U. S. 278, 11 Sup. Ct. 738; *McElvaine v. Brush*, 142 U. S. 155, 12 Sup. Ct. 156, 35 L. Ed. 971; *In re Frederich*, 149 U. S. 70, 13 Sup. Ct. 793, 37 L. Ed. 653; *Wight v. Nicholson*, 134 U. S. 136, 10 Sup. Ct. 487, 33 L. Ed. 865; *Ex parte Nielsen*, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118.

Point B

No court may by writ of habeas corpus properly release a prisoner under conviction and sentence of another court, unless for want of jurisdiction of cause or person or some matter rendering the proceeding void.

This proposition is merely an amplification of Point A. It is sustained by the authorities quoted under that point, *supra*.

Point C

A criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, is due process of law in the sense of U. S. Constitution, 14th Amendment, so long as it includes notice and a hearing or an opportunity to be heard before a court of competent jurisdiction, according to established modes of procedure.

Some of the numerous authorities supporting this proposition are: *Frank v. Mangum*, 237 U. S. 309, *Ex parte Royall*, 117 U. S. 241, 251, 29 L. Ed. 868, 871, 6 Sup. Ct. Rep. 734; *In re Frederich*, 149 U. S. 70, 77, 37 L. Ed. 653, 657, 13 Sup. Ct. Rep. 793; *Whitten v. Tomlinson*, 160 U. S. 231, 242, 40 L. Ed. 406, 412 16 Sup. Ct. Rep. 297; *Baker v. Grice*, 169 U. S. 284, 291, 42 L. Ed. 748, 18 Sup. Ct. Rep. 323; *Tinsley v. Anderson*, 171 U. S. 101, 105, 43 L. Ed. 91, 96, 18 Sup. Ct. Rep. 805; *Markuson v. Boucher*, 175 U. S. 184, 44 L. Ed. 124, 20 Sup. Ct. Rep. 76; *Urquhart v. Brown*, 205 U. S. 179, 51 L. Ed. 760, 27 Sup. Ct. Rep. 459.

Point C as set forth above is the verbatim language of paragraph two (2) of the syllabus in the case of *Frank*

v. Mangum. Excerpts from the opinion of Mr. Justice Pitney are as follows:

> "It is indeed settled by repeated decisions of this court that where it is made to appear to a court of the United States that an applicant for habeas corpus in the custody of a state officer in the ordinary course of a criminal prosecution, under a law of the state not in itself repugnant to the Federal Constitution, the writ, in the absence of very special circumstances, ought not to be issued until the state prosecution has reached its conclusion, and not even then until the Federal questions arising upon the record have been brought before this court upon writ of error."

(Quoting with approval what was said in *Covell v. Heyman,* 111 U. S. 176, 182, 28 L. Ed. 390, 392, 4 Sup. Ct. Rep. 355, a case of conflict of jurisdiction):

> 'The forbearance which courts of coordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. It is a principle of right and of law, and therefore, of necessity.'

> "It is a fundamental principle of jurisprudence, arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent juris-

diction cannot afterwards be disputed between the same parties."

Point D

This court will not review and revise the construction affixed to a state statute as to a question of local law by the court of last resort of the state.

The language of this court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, is as follows:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

And in *Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202, 82 L. Ed. 1290, this court said:

> "The decision in *Erie R. Co. v. Tompkins* * * * settles the question of power. The subject is now to be governed, even in the absence of state statute, by the decisions of the appropriate state court."

In the case at bar, petitioner complains of alleged errors committed by the Supreme Court of Nebraska in affirming the judgment of the District Court of Lancaster County, dismissing petitioner's application for a writ of habeas corpus. The alleged errors are that the court failed to hold that the judgment and sentence rendered and imposed by the District Court of Valley County against and upon petitioner, was void as being in contravention of Article I, Section 11 of the Constitution of Nebraska and Chapters 29-1802, 29-1803, 29-2201 and 29-2202 of the Compiled Sta-

tutes of Nebraska for 1929, and as being violative of the Sixth Amendment to the United States Constitution.

As petitioner is mistaken in his belief that the Sixth Amendment to the United States Constitution is involved, and as the Supreme Court of Nebraska has interpreted the Nebraska Constitution and Statutory provisions relied upon adversely to petitioner, it is plain that if the petitioner is to succeed in his present application for a writ of certiorari he must show that the Constitution and laws of Nebraska as interpreted by the Supreme Court of that State are repugnant to the 14th Amendment of the Federal Constitution. In the remaining points of this brief it will be demonstrated that petitioner has completely failed to make such a showing either in his application for a writ of habeas corpus, or in his present application for a writ of certiorari.

Point E.

The writ of habeas corpus will not issue unless the averments of the petition, taken as true, show probable cause, and a prima face case for relief.

The language of *Frank v. Mangum, supra*, on this point is as follows:

> "It was the duty of the court to refuse the writ if it appeared from the petition itself that appellant was not entitled to it," citing *Ex parte Watkins*, 3 Pet. 193, 201, 7 L. Ed. 650, 652; *Ex parte Milligan*, 4 Wall. 2, 110, 18 L. Ed. 281, 292; *Ex parte Terry*, 128 U. S. 289, 301, 32 L. Ed. 405, 407, 9 Sup. Ct. Rep. 77.

Point F.

Petition herein for a writ of certiorari should be denied as it fails to show any error in the proceedings under which petitioner was convicted.

Petitioner's first contention that the judgment and and sentence herein did not comply with Article I, Section 11 of the Constitution of Nebraska and Chapter 29-1802 of the Compiled Statutes of Nebraska, for 1929.

Section 11 of Article I of the Nebraska Constitution insofar as here applicable reads as follows:

> "In all criminal prosecutions the accused shall have the right. . . . . to demand the nature and cause of accusation, and to have a copy thereof. . . . ."

Chapter 29-1802 C. S. Neb. 1929 insofar as here applicable reads as follows:

> ". . . . . Within twenty-four hours after the filing of an indictment for felony, and in every other case on request, the clerk shall make and deliver to the sheriff, the defendant or his counsel a copy of the indictment, and the sheriff on receiving such copy shall serve the same upon the defendant, and no one shall be, without his assent, arraigned or called on to answer to any indictment until one day shall have elapsed, after receiving in person or by counsel, or having an opportunity to receive a copy of such indictment as aforesaid."

The Journal Entry in the District Court of Valley County pleaded by petitioner in his application for a writ of habeas corpus (Page 5 *supra*) reads, in part:

> "Now on this 27th day of September, 1932, the above entitled action came on for hearing upon the Information filed herein by the County Attorney in and for the County of Valley, State of Nebraska.
>
> The Plaintiff, THE STATE OF NEBRASKA, being represented in open Court by George A. Munn,

County Attorney, and the Defendant, ALBERT SMITH, being present in person in Open Court. Trial had.

Defendant appearing in Court and waives preliminary examination and asks that he be arraigned at once.

Thereupon the Defendant was duly and legally arraigned and plead "Guilty" to the Information charged."

Accordingly, petitioner does not contend that he was at no time informed of the charge filed against him, nor does he contend that the charge to which he pleaded guilty was misread at the time of arraignment; he contends that it was read in language unintelligible to him. He does not deny that he pleaded guilty to the charge as read to him; he does not contend that he was innocent of the crime described in the information as actually read to him; he contends that he "understood" that he was to be charged "merely" with "Common Burglary." We have then the case of a man who tacitly admits his guilt of the crime for which he was convicted seeking to escape the consequences of his felonious act on the technical ground, *inter alia*, that a copy of the information was not served upon him as "required" by the Constitutional and Statutory provisions set out above.

With respect to the necessity of serving a copy of the information on the defendant under these provisions the Supreme Court of Nebraska has held:

"Under section 436 of the Criminal Code, the defendant was entitled, as a matter of right, to a copy of the amended information, and one day in which to pre-

pare for trial . . . . . But these are rights accorded him by the Statute, which he could waive, and the presumption is that he has done so, since it does not appear that any objection was made in the District Court to proceeding to trial because of a want of compliance with the above Statutory command." *Barker v. State*, 54 Neb. 53, 74 N. W. 427.

"An information was filed with the Clerk of the District Court charging that F. had committed a felony, and the same day he plead "not guilty." A copy of said information was not delivered to F., but thereafter he procured an order of the court for compulsory attendance of witnesses and permission to take depositions. Three months later a jury was impaneled and sworn in said case, and, after the state had called a witness and propounded three questions, F. for the first time objeted that he had not been furnished a copy of said information. *Held*, that the Court did not err in overruling said objection." *Foster v. State*, 83 Neb. 264, 119 N. W. 475.

It will be observed that in the above two cases the Supreme Court of Nebraska held that the right of the accused to a copy of the information was subject to waiver even under a plea of "not guilty"—in which case the accused asserts his innocence. Surley, the provisions relied upon by petitioner can hardly be regarded as "mandatory" in cases where the accused has entered a plea of "guilty." Indeed, in the latter case, the Supreme Court of Nebraska has repeatedly held that:

"A person charged with crime may, by a judicial confession of guilt, waive all the rights secured to him by Section 11, Article I of the Constitution (of Nebras-

ka)." *McCarty v. Hopkins,* 61 Neb. 550, 85 N. W. 540; *Alexander v. O'Grady,* 290 N. W. 718; *Davis v. O'Grady,* 291 N. W. 82.

With respect to the corresponding guarantees in the Sixth Amendment to the Federal Constitution, this court has expressed itself as follows:

> "A plea of guilty to an indictment, whatever may be the grade of the crime, will be received and acted upon if it is made clearly to appear that the natural effects of it are understood by the accused." *Patton v. U. S.,* 281 U. S. 276, 74 L. Ed. 854, 50 Sup. Ct. 253.

Counsel for respondent do not understand this court to have implied in the above language that an accused who receives a heavier sentence than he anticipated after a plea of guilt should thereafter be permitted to assert that he did not understand "the natural effects" of his plea.

Petitioner does not and can not cite any decision either by this court or by the Supreme Court of Nebraska to the effect that the above quotations do not correctly state the law. He cites the case of *State v. Robertson,* 55 Neb. 41, 75 N. W. 37 as authority for the proposition: "This pleading the statute denominates either an indictment, information or complaint. A copy of this pleading in felony cases must be served upon the accused. It is to this that he must plead, and it is upon the allegations of this pleading that a judgment convicting him of having committed the offense charged must stand or fall."

In order that this court may obtain a glimpse at the outset of the kind of authorities petitioner cites throughout his brief, the appropriate portion of the syllabus by the court in the case of *State v. Robertson, supra,* is here set out:

"1. Section 256 of the Criminal Code construed, and *held*, that the filing of a complaint before an examining magistrate charging a person with the commission of a crime, causing him to be arrested, examined, and bound over to the District Court, does not arrest the running of the Statute of Limitations, unless the magistrate before whom the complaint was filed had jurisdiction to try and punish the accused for the offense with which he was charged."

In short, the case deals with the Statute of Limitations and has no bearing whatever on the present action. The sentences quoted by petitioner from the above opinion should be seen by this court in their context:

"It is not the pleading on which the State's Prosecution is based and to which the accused must plead and on which he must be tried. If a Grand Jury should indict A. on the tenth day of a month, and this indictment should not be returned and filed in court until the fifteenth of the month, we think the running of the statute would be arrested on the fifteenth, and not on the tenth; for until the indictment has been brought into court and filed, as provided by Section 410 of the Code of Criminal Procedure, it cannot be said that the indictment has been found nor that the state has begun the prosecution of the accused. The state, like a private individual, must commence its action by the filing in a court having jurisdiction to try and determine the action a pleading in which it charges the accused with having committed a certain crime at a time and place mentioned. This pleading the statute denominates either an indictment, infomation, or complaint. A copy of this pleading in felony cases must be

served upon the accused. It is to this that he must plead . . . . ."

Respondent cannot resist the temptation to suggest that petitioner must do more than rely upon a causual remark in an unrelated case if he hopes to prevail in his present contention.

Petitioner of course has the burden to show that the interpretations stated, by the Supreme Court of Nebraska, of the Constitution and Statutes of its own State, are repugnant to the Fourteenth Amendment to the Federal Constitution. In an effort to discharge this burden he cites and quotes from the case of *Snyder v. Massachusetts,* 291 U. S. 97. The quotation he gives is as follows: "The commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental . . . What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it."

With the quotation given, respondent, of course, has no quarrel whatever. Indeed, that quotation exactly states the position taken by counsel for the respondent in this entire series of briefs in answer to the epidemic of applications for the writ of certiorari addressed to this court during the past several weeks by inmates of the Nebraska Penitentiary. However, how utterly inapplicable the *Snyder* case is to the one at bar is apparent at once from the following excerpts from the opinion of Mr. Justice Cardozo:

"At the trial and on appeal Snyder made the claim that through the refusal of the trial judge to permit him to be present at a view there had been a

denial of due process of law under the Fourteenth Amendment of the United States."

"Counsel for Snyder moved that his client be permitted to view the scene with the jury, invoking the protection of the Federal Constitution."

"The question in this court is whether a view in the absence of a defendant who has made demand that he be present is a denial of due process under the Fourteenth Amendment."

"The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar. Consistently with that Amendment, trial by jury may be abolished . . . . Indictments by a Grand Jury may give way to informations by a Public Officer . . . . The privilege against self incrimination may be withdrawn and the accused put upon the stand as a witness for the state . . . What may not be taken away is notice of the charge and adequate opportunity to be heard in defense."

Obviously the entire case could be cited by the respondent as an excellent exposition of his own attitude. In the *Snyder* case this court held that there was *no error* in the proceedings below. Petitioner plainly is relying upon a casual remark, in itself beyond the possibility of dispute, as authority for his contention that the notice required in

criminal prosecutions by the Fourteenth Amendment of the Federal Constitution must be of a certain kind, i. e. by service of a copy of the information upon the accused whether he pleads guilty or not. Needless to say, there is nothing persuasive in his logic and the authorities he cites merely betray the weakness of his position.

Petitioner's second contention that the judgment and sentence herein did not comply with Article I, *Section* 11 *of the Constitution of Nebraska and Chapter* 29-1803 *of the Compiled Statutes of Nebraska* 1929.

Section 11 of Article I of the Nebraska Constitution insofar as here applicable reads as follows:

> "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel . . . . ."

Chapter 29-1803 C. S. Neb. 1929 insofar as here applicable reads as follows:

> "The court before whom any person shall be indicted for any offense which is capital, or punished by imprisonment in the Penitenitary, is hereby authorized and required to assign to such person counsel not exceeding two, if the prisoner has not the ability to procure counsel, and they shall have full access to the prisoner at all reasonable hours . . . . ."

Concerning these provisions petitioner contends: "The above quoted statute of Nebraska is mandatory in its nature and is necessary because of the requirements of Article I, Section 11 of the Constitution of Nebraska and the Sixth Amendment of the Constitution of the United States."

It is noteworthy that petitioner is able to cite not a single authority to support his interpretation that "the

Statute is mandatory." On the contrary, the Supreme Court of Nebraska has recently twice held that the right of the accused to have the assistance of counsel for his defense is waived by a judicial confession of guilt. *Alexander v. O'Grady*, 290 N. W. 718; *Davis v. O'Grady*, 291 N. W. 82.

As pointed out above (under petitioner's first claim of error), the Supreme Court of Nebraska has repeatedly held that:

> "A person charged with crime may, by a judicial confession of guilt, waive all the rights secured to him by Section 11, Article I of the Constitution (of Nebraska)." *McCarty v. Hopkins*, 61 Neb. 550, 85 N. W. 540; *Alexander v. O'Grady*, 290 N. W. 718; *Davis v. O'Grady*, 290 N. W. 82, and the cases cited therein.

Petitioner seems to argue that these decisions by the Supreme Court of Nebraska are not in harmony with the decisions of this court in *Powell v. Alabama*, 287 U. S. 45; *Johnson v. Zerbst*, 304 U. S. 458.

In *Powell v. Alabama, supra*, the facts as found by this Court were as follows:

> "The petitioners, hereinafter referred to as defendants, are negroes charged with the crime of rape, committed upon the persons of two white girls. The crime is said to have been committed on March 25, 1931. The indictment was returned in a state court of first instance on March 31, and the record recites that on the same day the defendants were arraigned and entered pleas of *not guilty* (Italics supplied). There is a further recital to the effect that upon the arraignment they were represented by counsel. But no counsel had been employed, and aside from a statement made by the trial judge several days later during a

colloquy immediately preceding the trial, the record does not disclose when, or under what circumstances, an appointment of counsel was made, or who was appointed. During the colloquy referred to, the trial judge, in response to a question, said that he had appointed all the members of the bar for the purpose of arraigning the defendants and then of course anticipated that the members of the bar would continue to help the defendants if no counsel appeared. Upon the argument here both sides accepted that as a correct statement of the facts concerning the matter.

"There was severance upon the request of the state, and the defendants were tried in three several groups, as indicated above. As each of the first three cases was called for trial, each defendant was arraigned, and, having the indictment read to him, entered a plea of not guilty. Whether the original arraignment and pleas were regarded as ineffective is not shown. Each of the three trials was completed within a single day."

This court held, in that case:

"In the light of the facts outlined in the forepart of this opinion—the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process."

Powell v. Alabama can be distinguished from the present case on several points. It is enough, however, to point out that in the Powell case the defendant entered a plea of *not guilty*. In the case at bar, the petitioner pleaded *guilty* to the information filed against him. Petitioner does not, and and cannot, cite any case decided by this court or any other court wherein it was held that an accused was unconstitutionally deprived of his right to assistance by counsel after entering a plea of guilty to the charge, unless perhaps under statutes which compel the court to reject a plea of guilty when entered.

In *Johnson v. Zerbst, supra*, the facts as found by this court were as follows:

> "Petitioner and one Bridewell were arrested in Charleston, S. C., November 21, 1934, charged with feloniously uttering and passing four counterfeit twenty-dollar Federal Reserve notes and possessing twenty-one such notes. Both were then enlisted men in the United States Marine Corps, on leave. They were bound over to await action of the United States Grand Jury, but were kept in jail due to inability to give bail. January 21, 1935, they were indicted; January 23, 1935, they were taken to court and there first given notice of the indictment; immediately were arraigned, tried, convicted, and sentenced that day to four and one-half years in the penitentiary; and January 25 were transported to the Federal Penitentiary in Atlanta. While counsel had represented them in the preliminary hearings before the commissioner in which they—some two months before their trial—were bound over to the Grand Jury, the accused were unable to employ counsel for their trial. *Upon*

arraignment, both pleaded not guilty, said that they had no lawyer, and—in response to an inquiry of the court—stated that they were ready for trial. They were then tried, convicted, and sentenced, without assistance of counsel" (Italics supplied).

This court held in that case:

> "Petitioner was convicted without enjoying the assistance of counsel. Believing habeas corpus was not an available remedy, the District Court made no findings as to waiver by petitioner. In this state of the record we deem it necessary to remand the cause. If—on remand— the District Court finds from all of the evidence that petitioner has sustained the burden of proof resting upon him and that he did not competently and intelligently waive his right to counsel, it will follow that the trial court did not have jurisdiction to proceed to judgment and conviction of petitioner, and he will therefore be entitled to have his petition granted. If petitioner fails to sustain this burden, he is not entitled to the writ."

Johnson v. Zerbst can again be distinguished from the present case on several vital points. It is enough, however, to again point out that in the Johnson case the defendant entered a plea of *not guilty*. In the case at bar, the petitioner pleaded *guilty* to the information filed against him.

In support of his present contention petitioner also relies upon the case of *Brown v. Mississippi*, 279 U. S. 278, and *Grosjean v. American Press Company*, 297 U. S. 233, 56 Sup. Ct. 444. The holding by this court in the *Brown* case is that "use of confession obtained by coercion and brutality as basis for conviction and sentence could not be justified on ground that State had the right to withdraw privilege a-

gainst self-incrimination." That in the *Grosjean* case is that "a State Statute imposing license tax for privilege of engaging in business of selling advertising upon all publishers of newspapers or magazines having weekly-circulation of more than 20,000 copies *held* unconstitutional under due process of law clause of 14th Amendment because it abridges the freedom of the press." Neither case has any bearing on the present action.

Petitioner also cites the *Grosjean* case in support of his contention that the statement made by respondent in previous briefs to the effect that "It is elementary learning that the 6th Amendment to the Federal Constitution does not guarantee procedure in criminal prosecutions in the courts of the several states" will not "hold water." Paragraph 5 of the syllabus in that case reads: "States are precluded from abridging freedom of speech or of the press, not by the 1st Amendment, but by the due process clause of the 14th Amendment." Respondent does not, and did not at any time, deny that some of the provisions of the Federal Bill of Rights are included in the concept of "due process"; respondent contends that the rights claimed by the petitioner herein and his *confreres* are definitely *not* included in that concept.

Petitioner's third contention that the judgment and sentence herein did not comply with Sections 29-2201 *and* 29-2202 *of the Compiled Statutes of Nebraska for* 1929.

The sections referred to read as follows:

> "29-2201. Before the sentence is pronounced, the defendant must be informed by the court of the verdict of the jury, and asked whether he has anything to say why judgment should not be passed against him."

"29-2202. If the defendant have nothing to say, or if he show no good and sufficient cause why judgment should not be pronounced, the court shall proceed to pronounce judgment as provided by law."

In view of the admitted facts that petitioner pleaded guilty and that neither trial nor verdict by jury was had, petitioner's present contention can only be described as frivolous. If petitioner is to be understood as claiming that the Journal Entry of his conviction and sentence is in some vague way incomplete, perhaps the following quotation from the syllabus by the court in the case of *Taylor v. State*, 86 Neb. 795, 126 N. W. 752, may clear up the difficulty:

"9. Where the record fails to show affirmatively that the court, before passing sentence upon the defendant, informed him that a verdict of guilty had been found against him, as required by Section 495 of the Criminal Code, and in the absence of any showing in the record to the contrary, the fact that such information was given will be presumed."

Petitioner' fourth contention that the judgment and sentence herein did not comply with Section 27-317 of the Compiled Statutes of Nebraska for 1929.

That portion of the Section referred to which petitioner quotes and upon which he relies reads as follows:

"27-317. A judge of the District Court may sit at chambers anywhere within his district and upon ten days' notice to the adverse party or his attorney of record, shall have power to: . . . . .Tenth. Receive a plea of 'guilty' from any person charged with a felony and pass sentence thereon, upon ten days' notice to the prosecuting attorney . . . . ."

It will be observed that petitioner does not contend that his plea of guilt was accepted and sentence thereon passed in vacation. The record shows, and petitioner does not deny, that these things happened in term time. Petitioner seems to feel that because the session in which these things happened was held in a "small room" (in the Court House) the court was exercising "jurisdiction in chambers." However, if respondent were to concede *arguendo* the truth of even this extraordinary proposition, it is still impossible to understand how petitioner can contend that the Section quoted was violated. He seems to interpret the Section as requiring ten days' notice to both the accused and the prosecuting attorney before the acceptance of a plea of guilt and sentence thereon. For this strange interpretation of the Statute petitioner can of course cite no authority. Just why an accused should have ten days' notice of his own plea of guilt he does not explain. Respondent could of course even concede to petitioner his interpretation of the Statutes and rely upon the doctrine of waivers, express or implied; but why continue the discussion further? It should amply suffice merely to quote the following provisions of the Nebraska Constitution and Statutes:

> "Article 5, Section 9 Const. Neb. The District Courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the legislature may provide; and the judges thereof may admit persons charged with felony to a plea of guilty and pass such sentence as may be prescribed by law."

> "Section 27-302, C. S. Neb. 1929. The District Courts shall have and exercise general, original and appeallate jurisdiction in all matters, both civil and criminal, except where otherwise provided."

In an attempt to give the Sections just quoted a curiously rigid construction, petitioner quotes the language of *State ex rel. Lang v. Civil Court of Milwaukee County*, 280 N. W. 347, at page 349, that: "Statutory powers conferred upon a court of inferior jurisdiction must be exercised and executed in substantially the manner prescribed by the Statute, or the judgment will be void." Suffice it to say that the case dealt with a bastardy proceeding in the Civil Court of Milwaukee County, i. e., with a purely statutory proceeding in a court of inferior jurisdiction. Respondent will not bore this tribunal with an attempt to point out the difference between courts of general and inferior jurisdiction, between judicial power as exercised at common law and as created purely by Statute.

In this same connection, petitioner cites the case of Ex parte "Bollinan" (Bollman), 4 Cranch 93, to the effect that: "Courts which are created by written law and whose jurisdiction is defined by written law cannot transcend that jurisdiction." To this propposition respondent offers no objection. He feels that he might briefly point out that this court *held* in that caes that it had the power "to issue the writ of habeas corpus ad subjiciendum," despite the fact that it found neither express constitutional nor express statutory grant of power to issue the same. The case could here be cited by the respondent.

Petitioner's fifth contention that the judgment and sentence herein did not comply with the 14th Amendment to the Federal Constitution in that the Journal Entry of his conviction and sentence failed to show any waiver other than that of preliminary examination.

Here petitioner relies entirely upon the following quotation from the opinion of Mr. Justice Black in the case of *Johnson v. Zerbst, supra*:

> "The constitutional right of an accused to be represented by Counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without Counsel. This protecting Duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."

Petitioner, it seems, would distort the language of this court above to mean: (a) That it is a procedural error to neglect to record a defendant's waivers; (b) That such procedural error would deprive the Court of Jurisdiction; and (c) That (a) and (b) are true even where the accused pleads guilty. Respondent does not so understand the meaning of the court.

Point G

Petition herein for a writ of certiorari should be denied as it fails to show that if any error was committed in the proceedings, such error was jurisdictional or such as to render the judgment of conviction void.

The discussion under Point F, *supra*, is applicable here, a *fortiori*.

Point H

Petition herein for a writ of certiorari should be denied as it fails to show that any rights of petitioner under the Constitution or laws of the United States have been impaired.

In the case of *Frank v. Mangum* the court said:

> "Repeated decisions of this court have put it beyond the range of further debate that the 'due Process' clause of the 14th Amendment has not the effect of imposing upon the states any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal, are not interferred with," citing *Hurtado v. California,* 110 U. S. 516, 532, 538, 28 L. Ed. 232, 237, 239, 4 Sup. Ct. Rep. 111 292; *Lem Woon v. Oregon* 229 U. S. 586, 589, 57 L. Ed. 1340, 1341, 33 Sup. Ct. Rep. 783, and cases cited.

The burden is on the petitioner to show wherein the form or mode of procedure adopted by the District Court of Valley County deprived him of an essential right or rights of notice or hearing or opportunity to be heard before a competent tribunal. The application for a writ of habeas corpus wholly fails to show any such deprivation.

Point I

Petition herein for a writ of certiorari should be denied as none of the authorities cited by petitioner in his supporting brief sustains his claim for a writ.

The authorities relied upon by petitioner will be considered in the order in which they are cited in his supporting brief: *Frank v. Mangum,* 237 U. S. 309. This case has

several times been cited for the respondent in this brief. It is sufficient to quote a portion of the last paragraph of the syllabus to show that it is no authority for the petitioner whatever:

> "The petitioner in this case was not denied due process of law in the conduct of his trial by the Courts of first instance or appellate . . . . ."

Snyder v. Massachusetts, 291 U. S. 97, 54 Sup. Ct. Rep. 330. This case was discussed *supra* under Point F (Petitioner's First Contention).

Powell v. Alabama, 287 U. S. 45, 53 Sp. Ct. Rep. 55. Discussed *supra* under Point F (Petitioner's Second Contention).

Johnson v. Zerbst, 304 U. S. 458, 58 Sup. Ct. Rep. 1019. Discussed *supra* under Point F (Petitioner's Second Contention).

Strauder v. West Virgina, 100 U. S. 303. This case involved the validity of a federal statute providing for the removal from state courts to the federal courts of causes where defendants were unable to enforce their rights as citizens of the United States. This court held the statute constitutional. The case has no bearing on the present action.

Neal v. Delaware, 103 U. S. 370. The following paragraph from the syllabus sufficiently indicates the nature of the case:

> "The exclusion, because of their race and color, of citizens of African descent from the grand jury that found, and from the petit jury that was summoned to try, the indictment, if made by the jury commissioners, without authority derived from the Constitu-

tion and laws of the State, was a violation of the prisoner's rights, under the Constitution and laws of the United States, which the trial court was bound to redress; and the remedy for any failure in that respect is ultimately in this court upon writ of error."

Brown v. Missippi, 297, U. S. 278. The holding in this case is that "use of confession obtained by coercion and brutality as basis for conviction and sentence could not be justified on ground that State had the right to withdraw privilege against self-incrimination." The case has no bearing on the present action.

Patton v. United States, 281 U. S. 276, 50 Sup. Ct. Rep. 253. The holding in this case is indicated by the following paragraphs from the syllabus (N. B. The plea was *not guilty*):

"6. Granting person accused of serious crime right to waive jury trial held not against public policy, notwithstanding common-rule law forbidding waiver.

The conditions existing at the time of the common-law rule, which prevented the accused from waiving his right to trial by jury, no longer exist, so that the maxim forbidding application of rule founded on a particular reason when the reason has ceased to exist is applicable."

"7. Right of accused to waive trial by jury extends to both misdemeanors and felonies."

"8. Before accused's waiver of jury can become effective, consent of government counsel and court must be had in addition to express and intelligent consent of defendant."

Grosjean v. American Press Company, 297 U. S. 233, 56 Sup. Ct. 444. Discussed *supra* under Point F (Petitioner's Second Contention).

Garland v. Washington, 232 U. S. 642, 34 Sup. Ct. 456. The complete syllabus reads:

> "A conviction upon a second and amended information after a prior conviction under the original information had been set aside and a new trial granted was not wanting in the due process of law guaranteed by U. S. Const., 14th Amend., because no arraignment or plea was had upon the second information, where, without raising that specific objection before trial, the accused had made certain objections to such information, and was put to a trial thereon before a jury in all respects as though he had entered a formal plea of not guilty."

The case could be, and hereby is, cited for the respondent.

Mooney v. Holohan, 294 U. S. 103, 55 Sup. Ct. Rep. 340. The syllabus reads, in part, as follows:

> "Requirement of 'due Process' is not satisfied by mere notice and hearing if state, through prosecuting officers acting on state's behalf, has contrived conviction through pretense of trial which in truth is used as means of depriving defendant of liberty through deliberate deception of court and jury by presentation of testimony known to be perjured, and in such case state's failure to afford corrective judicial process to remedy the wrong when discovered by reasonable diligence would constitution deprivation of liberty without due process."

As a matter of fact, petitioner's application to this Court for leave to file petition for an original writ of habeas corpus was in the above case denied. However, with respect to the above proposition, upon which petitioner in the case at bar apparently relies, it should be sufficient to point out that no claim is made in the present action that petitioner was convicted through the deliberate use of perjured testimony, through deliberate deception of Court and Jury, or through mere pretense of trial—the factual basis for the language of this Court in the Mooney case. In the case at bar the plea was "guilty."

State v. Robertson, 55 Neb. 41, 75 N. W. 37. Discussed *supra* under Point F (Petitioner's First Contention).

Ex parte "Bollinan" (Bollman), 4 Cranch 93. Discussed *supra* under Point F (Petitioner's Fourth Contention).

State ex rel. Lang v. Civil Court of Milwaukee County, 280 N. W. 347. Discussed *supra* under Point F (Petitioner's Fourth Contention).

Duncan v. Missouri, 152 U. S. 377, 14 Sup. Ct. Rep. 570. The syllabus reads:

> "1. After the amendment of 1890 to the constitution of Missouri, providing for the separation of the supreme court of the state into two divisions for the transaction of business, and for the transfer of any cause involving a federal question to the full court for decision, a conviction for a murder, committed before such amendment, was affirmed by one division of the court, and an application to it for a rehearing was denied, no reference to any federal question being made. Thereafter defendant moved for a transfer to the full court, on the ground that the amendment,

as applied to an offense committed before its adoption, violated the constitution of the United States. Held, that the constitutional right was not specially set up or claimed at such time, and in such way as to give jurisdiction to the supreme court of the United States to review a denial of the motion.".

"2. It seems that such amendment of the state constitution was not within the constitutional inhibition against ex post facto laws, because it conferred jurisdiction of the cause upon a division of the court less in numbers and different in personnel from the court as organized when the crime was committed."

The case has no bearing on the present action.

DeJonge v. Oregon, 229 U. S. 353, 57 Sup. Ct. 255. The following paragraph in the syllabus sufficiently indicates the nature of the case:

"9. Oregon Criminal Syndicalism Law, as applied to member of Communist Party convicted for assisting in conducting meeting called under auspices of party, regardless of what was said or done at meeting, *held* unconstitutional as repugnant to due process clause of Fourteenth Amendment, since, irrespective of objectives of party, member still enjoyed personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although called by Communist Party."

The case has no bearing on the present action.

Rogers v. Peck, 199 U. S. 425. The syllabus of the case reads as follows:

"The Governor of Vermont has ample power to grant reprieves to persons sentenced to death for murder. It is only where fundamental rights, specially secured by the Federal Constitution, are invaded that the Federal courts will interfere with a State in the administration of its law for the prosecution of crime, and it will not be presumed that if the freedom of a person properly convicted of murder and sentenced to death is improperly restricted that the state authorities will not afford the necessary relief. Federal courts will not, by writs of *habeas corpus*, reverse the proceedings of state courts while acting within their jurisdiction under statutes which do not conflict with the Federal Constitution, and the decision of the state court that it is not necessary for the court to refix the day for execution of a person already sentenced by the court and reprieved by the Governor, where the reprieve definitely sets the day, is one wholly within state practice and is not controlled by Federal Constitution or laws. Due process of law, guaranteed by the Fourteenth Amendment, does not require the State to adopt a particular form of procedure, so long as the accused has had sufficient notice and adequate opportunity to defend himself in the prosecution, and the State may determine, free from Federal interference or control in what courts crime may be prosecuted and by what courts the prosecutions may be reviewed. Statutes should be given a reasonable construction with a view to make effectual the legislative intent; and the granting by the Governor of a State of a reprieve to a person sentenced to death in order that an appeal may be heard in this court, from an order of the District Court dismissing a petition in

habeas corpus proceedings, is not such an interference by state authorities in a proceeding in the Federal courts in violation of ss 766, Rev. Stat., as will make the subsequent confinement and execution of the prisoner a deprivation of liberty or life without due process of law."

The case has no bearing on the present action.

Herbert v. Louisiana, 272 U. S. 312, 47 Sup.. Ct. Rep. 103. The nature of the case is sufficiently indicated by the following paragraphs from the syllabus:

"1. Under Const. U. S. Amend. 18, prosecution for same act of manufacturing intoxicating liquor in both federal and state courts does not constitute double jeopardy."

"6. Alleged misconstruction of state statute as to punishment by state Supreme Court *held* not to operate as denial of due process of law under Fourteenth Amendment, since construction of state statutes is for decision of state courts."

The case is hereby cited for the respondent.

In re Nielsen, 131 U. S. 176. The syllabus reads:

"A conviction making it unlawful for a man to cohabit with more than one woman in any territory of the United States bars a prosecution prescribing the punishment for adultery," under certain circumstances. "If the District Court improperly sustain a demurrer to a plea of such former conviction, the defendant may be released from imprisonment *** by habeas corpus, as the court had no authority to render the judgment."

The case involved double jeopardy, and has no bearing on the present action.

Moore v. Dempsey, 261 U. S. 86, 43 Sup. Ct. Rep. 265. The syllabus reads:

> "A petition for writ of habeas corpus, which alleged that the trial at which petitioners were convicted of murder and sentenced to death was held when public feeling growing out of a race riot was high, that the petitioners were represented by an attorney appointed by the court at the beginning of the trial, which lasted only three-quarters of an hour, that the denial of a motion for new trial based on those facts was affirmed by the highest court of the state, and the state chancery court prohibited from entertaining an application for habeas corpus, is sufficient as against demurrer to show that petitioners were being deprived of their lives without due process of law, so as to entitle them to a hearing in a federal court."

Like *Alabama v. Powell, supra,* and *Johnson v. Zerbst, supra,* there are vital differences between the case cited and the one at bar. Again it should be sufficient to point out that in the *Moore* case, the defendants pleaded not guilty.

Ex parte Resler, 115 Neb. 335, 212 N. W. 765. In this case the Supreme Court of Nebraska held: "It appearing that, as to charge contained in the complaint, jeopardy attached by virtue of the former trial, and it appearing from the admitted facts of the record that the charge contained in the complaint on which the petitioner is now being detained and imprisoned by respondent is one upon which jeopardy attached by virtue of the former trial * * * Petitioner discharged." The case at bar does not involve double jeopardy.

Herndon v. Lowry, 301 U. S. 242, 57 Sup. Ct. Rep. 732. The nature of the case is sufficiently indicated by the following paragraph in the syllabus:

> "If state statute penalizes innocent participation in a meeting held with an innocent purpose, merely because the meeting was held under the auspices of an organization, membership in which, or the advocacy of whose principles is also denounced as criminal, the law so construed and applied goes beyond the power to restrict abuses of freedom of speech and arbitrarily denies that freedom."

The case has no bearing on the present action.

In re Medley, 134 U. S. 160. This case involved a peculiar situation wherein a statute of Colorado provided for solitary confinement in capital cases. The statute repealed all former acts in conflict with it. Medley was sentenced under the repealing statute for an act committed before it could legally take effect. It was held that the act imposed a greater punishment than the acts repealed, and was ex post facto as to crimes committed before it went into effect. The court held that the sentence was void and that the petitioner should be released on habeas corpus. The court acknowledged in the opinion that this result was deplorable and attempted to meliorate its decision by "authorizing the court to dispose of the party as law and justice require, order the warden of the penitentiary to notify the Attorney General of the state in which he is held before discharging him." There were two dissenting opinions. The case has no bearing on the present action.

CONCLUSION

We respectfully submit that the petition filed in the District Court of Lancaster County, praying for a writ of

habeas corpus did not state a cause of action, and that the decisions to that effect by the Lancaster Court and the Supreme Court of Nebraska are not here open to question because the record shows:

1. That questions only of state law were raised;

2. That the decisions of the Supreme Court of Nebraska upon such questions are all adverse to the petitioner;

3. That no remote federal question is involved;

4. That no constitutional rights of the petitioner have in any way been impaired;

5. That no question of peculiar gravity or of national importance or consequence is involved;

6. That the petitioner has been able to cite not a single authority, federal, Nebraska, or otherwise that supports his right either to a writ of habeas corpus or of certiorari.

We submit that this case is not a proper one for review by certiorari in this court and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 364.—October Term, 1940.

Albert Smith, Petitioner,
vs.
Joseph O'Grady, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska.

On Writ of Certiorari to the Supreme Court of the State of Nebraska.

[February 17, 1941.]

Mr. Justice Black delivered the opinion of the Court.

The question presented is whether petitioner's application for writ of habeas corpus filed in a Nebraska state court alleged facts which if proven entitled him to release from prison because he was held pursuant to a court judgment rendered in violation of rights guaranteed him by the federal Constitution. The trial court declined to issue the writ, holding that the petition failed to state a cause of action justifying the relief prayed. Without requiring the state to answer and without giving petitioner an opportunity to prove his allegations, the application was dismissed. A motion for reconsideration, setting out additional facts, was similarly dismissed. On appeal, the Supreme Court of Nebraska affirmed, without opinion.

The judgment of the Nebraska Supreme Court is a final and authoritative answer to petitioner's contention that his imprisonment was illegal under the state's constitution or laws. But petitioner also contended that his imprisonment was illegal under the federal Constitution. And in denying the writ the Nebraska court necessarily held that petitioner's allegations—even if proven in their entirety—would not entitle him to habeas corpus, even if the petition showed a deprivation of federally protected rights.[1] It was to review this question that we granted certiorari. 311 U. S. —.

[1] It is suggested that the Nebraska Supreme Court's final judgment of affirmance rested on petitioner's failure to file a printed brief in that court, and that this was an adequate non-federal ground, precluding our review of the federal question raised. But this contention is obviously not sound, because the Supreme Court denied petitioner's motion for relief from the rule requiring printed briefs solely on the ground that upon examination of the whole record the court had found the appeal to be without merit.

But before examining the pleadings in order to determine whether the allegations showed a deprivation of federally protected rights, it is necessary to consider a preliminary contention urged by the state. The tenor of this contention is that under Nebraska law petitioner could not have his asserted federal rights determined in habeas corpus proceedings. And, supporting this contention, there is in the record a letter to petitioner from the trial judge who originally denied the writ—a letter indicating that petitioner's only relief from illegal imprisonment was by application to the Nebraska Parole and Pardon Board. This letter is not, however, a judicial determination, and apparently no state statutes or court decisions compel the result it indicates. Nor can we lightly assume that Nebraska affords no corrective process for one who is imprisoned under a judgment rendered in violation of rights protected by the federal Constitution. That Constitution is the supreme law of the land, and "Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution."[2] Moreover, while the opinions of the Nebraska courts do not mark clearly the exact boundaries within which Nebraska confines the historic remedy of habeas corpus, the Nebraska Supreme Court has held that the writ was properly invoked to obtain release from imprisonment resulting from deprivation of constitutional rights.[3] Because of this, and because a contrary conclusion would apparently mean that Nebraska provides no judicial remedy whatsoever for petitioner even though he can show he is imprisoned in violation of procedural safeguards commanded by the federal Constitution,[4] we are unable to reach the conclusion that habeas corpus is unavailable to him under Nebraska law.

It is therefore our duty to examine petitioner's allegations in order to determine whether they show that his imprisonment is the result of a deprivation of rights guaranteed him by the federal Constitution. The heart of his charge is that he, an ignorant lay-

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[2] Mooney *v.* Holohan, 294 U. S. 103, 113.

[3] In re Resler, 115 Neb. 335, 338-340. And see Kuwitzky *v.* O'Grady, 135 Neb. 466, 468. Cf. Darling *v.* Fenton, 120 Neb. 829.

[4] See Newcomb *v.* State, 129 Neb. 69.

man not represented by counsel, was tricked into pleading guilty to a serious offense. Among the specific allegations are:

Petitioner, without being informed of the charges against him, was arrested in one county, and then removed to another county for two days. There he was told he was wanted for burglary in a third county (Valley County), but would be dealt with leniently if he would plead guilty. After a long distance telephone conversation between petitioner and a man identified as the prosecuting attorney of Valley County, a conversation arranged and listened to by the Valley County sheriff, a sentence of not over three years was agreed upon. Petitioner was soon thereafter transferred to the Valley County jail. His efforts to get copies of the charges filed against him were unsuccessful, the sheriff telling him that this was "not necessary" since "everything had been 'fixed.'" After three days in the Valley County jail, and "without ever having had a copy of the charge", petitioner was taken before a trial judge, "summarily arraigned, and, upon his prearranged plea of guilty, sentenced, to his surprise and consternation, to a term of twenty years imprisonment in the Nebraska State Penitentiary." Petitioner, an uneducated layman, had no knowledge of law or legal procedure, and had never before been arrested or been in a court room for any purpose whatsoever. Upon imposition of the twenty year sentence, however, he vigorously protested, asked the court and the prosecuting attorney for a copy of the charge to which he had pleaded guilty, and, this request being refused, asked permission to withdraw his plea of guilty, requested appointment of an attorney to advise and assist him, and asked that he be given a proper opportunity to defend himself. All of these requests were refused by the court, and "within the hour" he was on his way to the penitentiary, accompanied by the sheriff. After arriving at the penitentiary he discovered "that he had been duped and inveigled into entering a plea of guilty to a charge of burglary with explosives . . . ," punishable in Nebraska by twenty years to life imprisonment. Simple burglary, to which petitioner agreed to plead guilty, upon condition that he be sentenced to three years, carries a penalty of one to ten years. During the eight years petitioner has been in the penitentiary, he has done everything an uneducated person could do to bring his illegal im-

prisonment to the attention of the Nebraska authorities, but has not been able to get counsel because of lack of funds. His appeals to the Board of Pardons have been futile. Because of his ignorance of his rights, and because of the trial court's failure to appoint, and his inability to obtain, counsel, the original sentence was not appealed.

These allegations, if true, undermine and invalidate the judgment upon which petitioner's imprisonment rests. The circumstances under which petitioner asserts he was entrapped and imprisoned in the penitentiary are wholly irreconcilable with the constitutional safeguards of due process. For his petition presents a picture of a defendant, without counsel, bewildered by court processes strange and unfamiliar to him, and inveigled by false statements of state law enforcement officers into entering a plea of guilty. The petitioner charged that he had been denied any real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process; that because of deception by the state's representatives he had pleaded guilty to a charge punishable by twenty years to life imprisonment; that his request for the benefit and advice of counsel had been denied by the court; and that he had been rushed to the penitentiary where his ignorance, confinement and poverty had precluded the possibility of his securing counsel in order to challenge the procedure by regular processes of appeal. If these things happened, petitioner is imprisoned under a judgment invalid because obtained in violation of procedural guaranties protected against state invasion through the Fourteenth Amendment.[5] The state court erroneously decided that the petition stated no cause of action. If petitioner can prove his allegations the judgment upon which his imprisonment rests was rendered in violation of due process and cannot stand.

Reversed and remanded.

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[5] Cf. Walker *v.* Johnston, No. 173 this Term, decided February 10, 1941; Johnson *v.* Zerbst, 304 U. S. 458; Mooney *v.* Holohan, 294 U. S. 103. And see Chambers *v.* Florida, 309 U. S. 227.